Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

DAVID C. GEISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case charging that a mid-level manager at a nuclear power plant knowingly and willfully made false statements to officials of the Nuclear Regulatory Commission, the two questions presented are:

1. Whether this Court should grant the petition to resolve a conflict in the circuits over the appropriate circumstances for instructing the jury on a theory of deliberate ignorance – namely, whether such an instruction must be restricted to cases where any "ignorance" was motivated by the attempt to escape conviction.

2. Whether this Court should grant the petition to resolve a conflict in the circuits over the appropriate harmless error standard for a deliberate ignorance instruction that is not supported by the evidence.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

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The opinion of the court of appeals (*see* Petitioner's Appendix ("App.") (1a-60a) is published as *United States v. Geisen*, 612 F.3d 471 (6th Cir. 2010). The court's denial of rehearing and rehearing *en banc* (App. 139a) is published as No. 08-3655, 2010 U.S. App. LEXIS 19467 (6th Cir. Sept. 2, 2010). (App. 139a-140a) The pertinent opinion of the district court (App. 61a-64a) is unreported.

JURISDICTION

The court of appeals entered judgment on July 15, 2010. App. 141a. The court denied a timely petition for rehearing and for rehearing en banc on September 2, 2010. App. 139a-140a This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1001 provides:

Statements or Entities Generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to --

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

STATEMENT OF THE CASE

In the Fall of 2001, Defendant-Appellant David C. Geisen was one of a number of managers and engineers at the Davis-Besse nuclear power plant in Oak Harbor, Ohio (referred to herein as "Davis-Besse" or "the Plant"), who interacted with the Nuclear Regulatory Commission ("NRC" or "Commission"), in response

to an expedited request for information sent to a number of nuclear power plants throughout the country. On the basis of these interactions, Mr. Geisen was charged with five counts of knowingly and willfully making false statements to the NRC in violation of 18 U.S.C. § 1001.[1]

The case against Mr. Geisen was tried in October 2007. The critical issue at trial was whether Mr. Geisen, in his role as a supervisor, had known about inaccuracies in the Plant's submissions to the NRC and intentionally sponsored them anyway. Mr. Geisen's defense was that while he perhaps "should have known" about any inaccuracies and should have done a more thorough job as a supervisor, he did not know the statements were inaccurate at the time they were made, and he did not willfully make any false statements.

On the issue of intent, the government's trial presentation was replete with evidence about what Mr. Geisen should have done to better manage the submissions to the NRC. *See* Trial Transcript ("TT") of Moffitt, Record Entry ("RE") No. 259, pp. 1307-08; Record on Appeal ("ROA") pp. 159-60 (Government

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[1] Before obtaining an indictment, the government offered Mr. Geisen a deferred prosecution agreement. ROA pp. 469-79. Under the proffered terms, Mr. Geisen merely needed to admit knowledge of the falsity of the statements and willfulness in making them, and the government would refrain from prosecuting him. ROA pp. 473-79. Mr. Geisen rejected the government's offer, as he adamantly denied having intentionally made any false statements. ROA at pp. 470. The district court's refusal to permit jurors to hear about Mr. Geisen's rejection of this deferred prosecution agreement was the subject of an extensive dissenting opinion below. App. 1a-60a.

witness asked whether Mr. Geisen should have assigned another supervisor to review tables submitted to the NRC); (TT of Ulie, RE No. 267, p. 1575; ROA p. 117) (Geisen told NRC investigators he should have done a better job of ensuring the accuracy of the information presented to the NRC); (TT of Geisen, RE No. 261, pp. 1944-45; ROA pp.42-43) (Geisen expresses regret at not spending more time reviewing past inspection data and at his failure to involve a second engineer). But the government's evidence was substantially less strong (Mr. Geisen submitted below that it was insufficient) in terms of showing that Mr. Geisen actually knew about any inaccuracies in the submissions.

Responding to this deficiency, the government sought and obtained an instruction after the close of evidence permitting jurors to convict Mr. Geisen based on a showing of deliberate ignorance, or willful blindness, rather than actual knowledge and willfulness. Trial transcript, RE No. 262, pp. 2293-94. Mr. Geisen objected vigorously, arguing there was no evidence he refused to acquire knowledge in order to escape prosecution, thus there was no evidentiary predicate for the instruction. *Id.* at 2295-96. Mr. Geisen further argued that giving the instruction in this case, where there was no evidence that he deliberately avoided gaining knowledge, created a real danger that jurors would become confused and determine they could convict Mr. Geisen for what he "should have known." *Id.* The district court worried whether the instruction permitted conviction based on such considerations, *id.* at

2297; App. 31a, but ultimately gave the standard Sixth Circuit willful blindness instruction. *Id.* at 2338-39.[2]

After considerable deliberations, jurors returned a split verdict, acquitting on two counts and convicting on the three others. Mr. Geisen moved for a new trial, focusing largely on the deliberate ignorance instruction. ROA 642-48 & 669-74.

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[2] The Court gave the following instruction:

> Next, I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a defendant deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concerned material facts -- I'm sorry, concealed -- let me read that over. I'm sorry. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

Id. at 2338-39.

The district court denied the new trial motion. In doing so, the trial judge did not attempt to justify giving the deliberate ignorance instruction. Instead, relying on *United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995), the district court ruled that "[t]he Circuit has repeatedly held that the instruction is harmless error where sufficient evidence of actual knowledge was present. This is the case here." (App. 63a)

Mr. Geisen appealed to the Sixth Circuit. On July 15, 2010, a panel of the Sixth Circuit entered an opinion affirming the conviction and rejecting Mr. Geisen's argument that the trial court had committed reversible error. With regard to the deliberate ignorance instruction, the panel held that such an instruction was proper so long as the evidence can fairly support an inference that the manager "deliberately chose not to inform himself in preparing the submissions to the NRC." App. 33a.

The panel then reaffirmed that under *United States v. Mari*, 47 F.3d at 786, any error in giving the instruction was *always* harmless as a matter of law so long as the government presents some evidence of actual knowledge. App. 29a. Mr. Geisen filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on September 2, 2010. App. 139a.

Operating parallel to the criminal proceeding was Mr. Geisen's challenge to an administrative action the NRC brought against him in order to ban him from participation in NRC licensed activities; the administrative action was based on the same facts and circumstances as the criminal prosecution. *See* App. 65a.

After the criminal conviction was entered in this case, a panel of the NRC's Atomic Safety and Licensing Board held an evidentiary hearing to determine whether the preponderance of the evidence indicated Mr. Geisen deliberately made false statements to the NRC. App. 66a-67a. The administrative panel refused to apply the doctrine of collateral estoppel based on the outcome of the criminal trial because it determined that the criminal conviction may have been based on deliberate ignorance, which it found insufficient to meet the Commission's standard for deliberate misconduct. App. 126a-127a. After considering the evidence, the panel set aside the Enforcement Order, finding that the NRC Staff failed to show by preponderance of the evidence that Mr. Geisen knowingly provided false and misleading information to the NRC. App. 66a-67a.

On August 27, 2010, the NRC affirmed the Licensing Board's decision. App. 65a-138a.[3] Thus, while Mr. Geisen has been convicted by jurors of making intentional false statements to the NRC in the criminal case where the jury was instructed on a theory of deliberate ignorance, he has been exonerated of the charge of making false statements in a parallel proceeding before the NRC itself, with a less stringent standard of proof and the application of a more rigorous *mens rea* requirement.

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[3] The Commission's August 27, 2010 final decision in Mr. Geisen's administrative proceeding can be found at Appendix C, 65a-138a. A copy of the initial decision of the NRC's Atomic Safety and Licensing Board, which is voluminous, was provided to the Sixth Circuit after oral argument in a submission made pursuant to Fed. R. App. P. 28(j).

REASONS FOR GRANTING THE PETITION

Petitioner David C. Geisen asks this Court to grant certiorari to provide guidance on a legal doctrine that has been the source of great confusion and controversy in both this case and in federal criminal cases generally – the doctrine of deliberate ignorance. In the published decision below, the Sixth Circuit upheld the giving of a deliberate ignorance instruction based on the government's charge that a mid-level manager of a nuclear power plant had been less than diligent in his preparation for interactions with federal regulators under circumstances where it could not even rationally be alleged that his lack of diligence emanated from a desire to escape criminal conviction. According to the court below, such an instruction is proper so long as the evidence can fairly support an inference that the manager "deliberately chose not to inform himself in preparing the submissions to the NRC."[4] App. 33a. The Sixth Circuit also concluded that even if such an instruction should not have been given, any error was *per se* harmless error under *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995), which had held that the erroneous giving of a deliberate ignorance instruction is always harmless so long as any evidence of actual knowledge exists. *Id.* at 786-87.

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[4]Mr. Geisen emphatically disputes the panel's assertion that he "deliberately chose not to inform himself in preparing for NRC submissions" – a finding that the trial court itself never made. Nonetheless, it is Mr. Geisen's position that even if such a finding was warranted, it cannot properly serve as the predicate for a deliberate ignorance instruction.

Both aspects of the Sixth Circuit's deliberate ignorance ruling are worthy of this Court's review. The Court of Appeals' determination on the proper circumstances for giving the deliberate ignorance instruction conflicts with rulings from other circuits that have restricted this instruction to situations where the evidence shows the defendant's motive in refusing to learn information was to escape eventual conviction. Likewise, the Sixth's Circuit's application of the *per se* harmless error rule of *United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995), conflicts with rulings from other circuits that have applied traditional harmless error analysis when a trial court erroneously instructs the jury on deliberate ignorance.

The questions presented in this petition are of substantial national importance. The original "deliberate ignorance" cases involved drug couriers and other individuals who had taken active steps to wall themselves off from knowledge of clearly *illegal* activity making it arguably fair to permit juries to conclude that those individuals knowingly and willfully engaged in illegal behavior. *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) (en banc) (defendant claimed she had no knowledge of marijuana in the car she drove from Mexico to the United States); *Mari*, 47 F.3d at 783-84 (defendant claimed to have no knowledge of the 33 kilograms of cocaine in the truck he borrowed from a friend of an acquaintance); *United States v. Jewell*, 532 F.2d 697, 699 n.1 (9th Cir. 1976) (en banc) (facts similar to those in *Heredia*). Cases like the one below, however, reject any sensible restrictions on when the instruction can be given, upholding a deliberate ignorance instruction in circumstances where it cannot even be argued that any failure to learn of the

adequacy of prior cleanings of the nuclear plant – the subject of the regulators' inquiry – was done for the purposes of escaping a criminal prosecution. And to make matters worse, the *per se* harmless error rule applied below means that there will never be any incentive for trial courts to restrict this instruction to the narrow circumstances for which it was originally created.

Unchecked expansion of the deliberate ignorance instruction poses serious systemic dangers, particularly when applied to cases like this one. Indeed, the contrast between the result of the parallel administrative proceeding and that of the criminal trial demonstrates the necessity of reviewing the giving of the deliberate ignorance instruction under traditional harmless error analysis. In the administrative hearing, the Board determined the standard for deliberate misconduct that governed the NRC proceeding could not be met by a finding of deliberate ignorance and thus the theory was not introduced in the administrative hearing. Forced as a result to prove actual knowledge, the NRC staff failed to carry its burden – even under the civil preponderance of the evidence standard.[5] The contrast between the two results suggests that the jury's deliberations in the criminal trial were improperly complicated by the district court's decision to give the deliberate ignorance instruction. But because of the operation of *Mari's per se* harmless error rule, Mr. Geisen is effectively foreclosed from challenging the instruction.

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[5] Initial Decision at 20-22.

The scope of the false statement laws is broad, and thousands of mid-level managers like Mr. Geisen interact with government officials each day. The Sixth Circuit's application of this doctrine to such interactions means that virtually any incorrect statement to federal officials can be charged criminally, so long as the government can show that the defendant's preparation prior to the statement was inadequate. That cannot be what Congress meant when it made it a crime to "knowingly and willfully" make false statements to government officials. *See* 18 U.S.C. § 1001(a). This Court's corrective intervention is required.

I. The Court Should Grant Certiorari to Resolve Two Important Questions Regarding the Deliberate Ignorance Doctrine, on which the Lower Courts are Currently Divided.

The Sixth Circuit panel applied a controversial legal doctrine in an unreasonably broad fashion that conflicts with the decisions of other courts of appeals, and creates a grave risk of a conviction without the requisite *mens rea*. There can be no doubt about the confusing and controversial nature of the deliberate ignorance/willful blindness doctrine.[6] As one commentator has observed:

> Scholars and courts actively disagree about what the definition is and what it ought to be. Because of an inadequate understanding of why

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[6] Courts refer to "deliberate ignorance" and "willful blindness" instructions interchangeably. We use the term "deliberate ignorance" instruction throughout this petition because that is the language the district court included in its instruction here.

> these cases of recklessness ought to be treated the same as cases of knowledge, the willful blindness doctrine is beset by controversy at almost every level. Indeed, the many matters of continuing controversy include the elements of wilful blindness, the requisite foundation for a wilful blindness instruction, the question of whether giving a properly worded wilful blindness instruction can be reversible error, and the appropriate standard for reviewing whether the instruction was properly given.
>
> More damning still, a close review of even a portion of the cases in this area reveals that, no matter what doctrinal elements courts have purported to include in their definitions, the uncertainty as to the meaning of the doctrine has often left juries with a discretionary instruction that forces them to decide whether or not to attribute guilty knowledge to the defendant without either significant guidance on how to make the decision or significant judicial review of the decision once made. Identical cases can be treated differently, and the outcome of any particular case, even when all the facts are given, cannot be judged correct or otherwise.

Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. Cal. L. Rev. 953, 980-81 (1998); *and see* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 227-29 (Summer 1990) (noting "risk of conviction for negligence" created by instruction and observing that even some appellate courts appear to

have mistakenly condoned such a theory of criminal culpability).

The evolution of the use of the doctrine of deliberate ignorance in Anglo/American jurisprudence provides some clues as to the source of the confusion that currently exists regarding the use of the deliberate ignorance instruction. Though the idea that willful blindness or deliberate ignorance could, in limited circumstances, be a substitute for actual knowledge has existed in English law for over a century, courts applying it were unclear as to the threshold level of awareness the defendant had to have in order to be convicted on a theory of willful blindness. *See* Jonathan L. Marcus, Note: *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2233-34 (1993). Some decisions implied that a failure to investigate suspicions of wrongdoing would constitute willful blindness, while others indicated that a conviction on a willful blindness theory would only be proper if there was evidence the defendant's lack of knowledge was a charade. *Id.* at 2234 (citing Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1361-65 (1992)).

Although this Court appeared, in passing, to approve of the application of the deliberate ignorance doctrine in some circumstances, *see Spurr v. United States*, 174 U.S. 728, 735 (1899) (finding, in a case regarding whether a bank officer certified checks with knowledge the bank could not cover them, that "evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact."), it has not

addressed the doctrine in the past century and its development has occurred entirely in the lower courts.

As the use of the doctrine evolved it appears to have been most often applied in narcotics cases. Marcus, 102 Yale L.J. at 2234 (citing *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982) (noting that deliberate ignorance is an integral part of the drug trade)). Commentators have pointed out that because the common law has never specified the level of awareness necessary to trigger criminal culpability, the application of the doctrine in cases, like drug cases, in which there is no legal duty to know the incriminating facts, can lead to unjust convictions where there is an innocent reason for the defendant's lack of knowledge. *Id.* at 2235.

Because of these problems, "many of the courts of appeals admonish that 'caution is necessary in giving a willful blindness instruction.'" *United States v. Alston-Graves*, 435 F.3d 331, 340-41 (D.C. Cir. 2006) (quoting *United States v. Cassiere*, 4 F.3d 1006, 1023 (1st Cir. 1993)). As the D.C. Circuit has explained, the cautionary language varies: "[s]ome [courts] say that such an instruction is 'rarely appropriate,' or only proper in ... 'rare cases.' Others are 'wary of giving a willful blindness instruction,' or advise that the instruction be given only 'sparingly.'" *Alston-Graves*, 435 F.3d at 341 (citing cases).

The reason for this caution is simple: The instruction improperly invites the jury to "convict on a basis akin to a standard of negligence: that the defendant *should* have known that the conduct was illegal." *United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991); *see also United States v. Springer*, 262 Fed.

Appx. 703, 706 (6th Cir. 2008); *see generally Alston-Graves*, 435 F.3d at 340. Other Circuits have similarly held that the instruction can "reliev[e] the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (improper use of willful blindness instruction affected defendant's constitutional right to proof beyond a reasonable doubt and required Circuit to vacate conviction and remand to trial court.)

The Sixth Circuit appropriately recognized these dangers and the need for caution, but its opinion did not heed the warning. In particular, the Sixth Circuit decision applied the deliberate ignorance doctrine beyond where any court seems to have taken it before, finding that the instruction could be given on the basis of a showing that accused "deliberately chose not to inform himself in preparing the submissions to the NRC." App. at 33a Such a holding conflicts with the decisions of other courts of appeals in two ways: (1) it eliminates any requirement that the accused's ignorance be motivated by the attempt to escape conviction; and (2) it applies a *per se* harmless error rule that ignores the very reasons why caution is necessary in giving the instruction. Both issues are worthy of this Court's review.

A. This Court Should Grant the Petition to Resolve a Conflict in the Circuits Over the Appropriate Circumstances for Instructing the Jury on a Theory of Deliberate Ignorance – Namely, Whether Such an Instruction Must be Restricted to Cases Where Any "Ignorance" Was Motivated by the Attempt to Escape Conviction.

When it determined the deliberate ignorance instruction can be given upon a showing that a defendant "deliberately chose not to inform himself in preparing the submissions to the NRC," App. at 33a the panel ignored the absence of any evidence of motive to escape prosecution. Other courts of appeals, however, have squarely held that such a motive is an indispensible foundation for the giving of such an instruction. *See United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States v. Delreal-Ordones*, 213 F.3d 1263, 1268-69 (10th Cir. 2000). By rejecting this requirement, the panel appears to have taken sides with a closely divided decision from the Ninth Circuit, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc), in which a bare majority rejected a motive requirement in deliberate ignorance cases.

Judge Kleinfeld's concurring opinion in *Heredia* showed the unfairness of abandoning the motive requirement. 483 F.3d at 924-25 (arguing that a deliberate ignorance instruction should include an instruction that the jury must find "a motivation to avoid criminal responsibility to be the reason for the lack of knowledge," otherwise the standard for crimi-

nal knowledge would be lower than that for a finding of evidentiary knowledge).

In a nutshell, Judge Kleinfeld's concurring opinion demonstrated why preservation of the motive requirement is necessary to prevent conviction of individuals purely on the basis of what they should have known, rather than the requisite *mens rea*. *Id.* at 929 (asserting that without the motive requirement, the deliberate ignorance instruction "supports convictions of persons whom Congress excluded from statutory coverage with the word 'knowingly.'").

This Court should grant the petition in order to confirm that the motive requirement must serve as a substantial, concrete requirement, which limits the giving of the deliberate ignorance instruction to the narrow set of circumstances from which it arose. Restricting the deliberate ignorance instruction to cases in which there is evidence that the defendant took affirmative steps to avoid gaining knowledge based on a motive to escape conviction will cabin the doctrine within its proper bounds. The doctrine can still be applied to paradigm situations in which a transporter of drugs denies knowledge of large quantities of contraband in his possession despite overwhelming circumstantial evidence creating a fair inference that the *only* reason the defendant did not know about the illegality was because he affirmatively closed his eyes in order to escape prosecution. *E.g.*, *United States v. Mari*, 47 F.3d 782, 783-84 (6th Cir. 1995) (driver of car containing 33 kilograms of cocaine made verifiably false statements about his reasons for being in Memphis and ultimately claimed that he did not know about contraband because he had been given the car he

was driving by a woman at Bible study class in Miami, who said he could drive the car to see his cousin in New York if he would first drop off patio furniture in Houston); *Heredia*, 483 F.3d at 917 (en banc) (driver of car containing 349.2 pounds of marijuana claimed that she had borrowed car from her aunt, and that obvious smell of detergent had been explained by the aunt has having come from spill in car a few days earlier); *United States v. Jewell*, 532 F.2d 697, 699 n.1 (9th Cir. 1976) (en banc) (defendant with 100 pounds of marijuana in car had smoked marijuana in bar in Mexico where he was offered $100 to drive car into the United States and drop it off at the address at which the vehicle was registered).

At the same time, preserving the motive requirement will prevent application of the doctrine to cases in which any ignorance could not conceivably have been motivated by a desire to escape conviction, and where many innocent reasons exist why someone would be "ignorant" of facts that could give rise to criminal knowledge. Failing to properly prepare for interactions with regulatory officials about the historical facts surrounding inspections of a portion of the plant falls directly within this category. Not only are there many innocent reasons why a mid-level employee who did not personally conduct the disputed inspections would be ignorant of the details of those inspections – even if he "should have known" the details as part of his management responsibilities – it is simply inconceivable that any individual could have been motivated to remain ignorant out of a desire to escape conviction. No criminal investigation was even contemplated at the time Mr. Geisen interacted with government regulators, and failing to fully assimilate historical

information about prior plant cleanings is not inherently criminal. While the panel does not address this issue at all, there is simply no evidence in this case that Mr. Geisen ever attempted to remain ignorant of prior plant cleanings in order to escape prosecution; indeed, virtually every one of the government's witnesses was a supervisor with at least as much exposure to the information regarding the cleanings as was Mr. Geisen; each denied knowledge of the falsity of the submissions and expressed ignorance of the prior cleanings. It is not a fair or rational inference from this evidence that the government's supervisory witnesses were ignorant for innocent reasons but that Mr. Geisen alone consciously remained in the dark to escape a conviction when possession of knowledge could not possibly have been thought to be criminal.

Because the critical motive factor was absent here, Mr. Geisen's case presents an excellent vehicle for addressing this issue, as it will allow the Court to draw the line beyond which deliberate ignorance instructions cannot go. If the Court adopts the "motive" rule that applies in at least three other circuits, it will be dispositive in Mr. Geisen's case.

B. The Court Should Grant the Petition to Resolve a Conflict in the Circuits over the Appropriate Harmless Error Standard for a Deliberate Ignorance Instruction that is Not Supported by the Evidence.

The second important question raised by this case arises from the Sixth Circuit's reaffirmation of *Mari*'s *per se* harmless error rule. That rule – which holds that erroneously giving a deliberate ignorance instruc-

tion is always harmless if the jury could properly have convicted on the basis of actual knowledge – conflicts with how other Circuits have addressed the question of when a deliberate ignorance instruction can be harmless. *See United States v. Stone*, 9 F.3d 934, 939-40 (11th Cir. 1993) ("We recognize that the Fifth, Eighth, and Ninth Circuits have reached a contrary conclusion on the issue of whether a deliberate ignorance instruction is harmless *per se*. *See, e.g., United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992); *United States v. Mapelli*, 971 F.2d 284 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992) (implicit holding); *United States v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984).")

The irony of *Mari*'s *per se* rule is that it prohibits reversal in cases like this one, where the recognized risks of the deliberate ignorance instruction are greatest. Although jurors are generally presumed to follow instructions, in a situation where substantial evidence exists of what a defendant "should have known," but no evidence exists to support a true finding of deliberate ignorance, a juror might find deliberate ignorance on the basis of what a defendant should have known. *See, e.g, United States v. Barnhart*, 979 F.2d 647, 651-52 (8th Cir. 1992). This is so, even where the instruction cautions not to convict on the basis of "negligence," a legal doctrine not immediately accessible to a lay juror. *Id.*

The divide in the Courts of Appeal is itself reflective of analytical difficulties in applying this Court's cases on when the submission of an unsupported legal theory to the jury can be harmless. *Mari*'s *per se* harmless

error rule relies on *Griffin v. United States*, 502 U.S. 46 (1991), which held that instructing jurors on alternative *factual* theories of liability, one of which is unsupported by the evidence, does not provide an independent basis for reversing an otherwise valid conviction. *Id.* at 59-60. But given the situation presented here, it is far from clear why the more appropriate rule is not the one of *Yates v. United States,* 354 U.S. 298 (1957), which held that constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory. As *Griffin* makes clear, its rule does not swallow the rule of *Yates*, since when "jurors have been left the option of relying upon a *legally inadequate* theory, there is no reason to think that their own intelligence and expertise will save them from that error." 502 U.S. at 59. (emphasis added).

In recent decisions, the Court has relied on *Yates*' rule in situations analogous to this one – where there are reasons to believe that a lay juror might well have convicted on the basis of its receipt of an invalid legal theory. *E.g.*, *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (applying *Yates* rule to circumstances where trial jury had been improperly instructed on alternative theories of intent); *Skilling v. United States*, 130 S. Ct. 2896 (2010) (Applying *Yates* rule to circumstances where trial jury improperly instructed on improper object of conspiracy). These decisions cast doubt on *Mari*'s *per se* rule and its reliance on *Griffin*. Moreover, to the extent the conflict in the circuits on this rule reflects the underlying difficulty in determining whether *Griffin* or *Yates* should apply to this situation, this divide

itself makes clear that it is one of extreme importance, worthy of this Court's corrective intervention.

This case also presents an excellent vehicle for addressing whether *Mari*'s *per se* rule correctly states the law. In denying Mr. Geisen's motion for a new trial, the district court did not attempt to defend giving the deliberate instruction but instead ruled solely on the ground of the *Mari* rule. The Court of Appeals also upheld the instruction in part based on *Mari*'s rule. Most importantly, though, the NRC decision exonerating Mr. Geisen of having actual knowledge of the falsity of the statements on the same facts under a civil standard, highlights the critical role the *Mari* rule played in insulating an otherwise indefensible verdict from appellate review. In this case, it is clear that *Mari*'s harmless-error-per-se rule was dispositive, making this a particularly appropriate case for examining the propriety of the rule itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1, 2010

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
	)	No. 08-3655
v.	)	
DAVID GEISEN, *Defendant-Appellant.*	)	

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 06-00712-001—David A. Katz, District Judge.

Argued: January 19, 2010

Decided and Filed: July 15, 2010

Before: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Timothy P. O'Toole, MILLER and CHEVALIER CHARTERED, Washington, D.C., for

Appellant. John Luther Smeltzer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Timothy P. O'Toole, Richard A. Hibey, Andrew T. Wise, MILLER and CHEVALIER CHARTERED, Washington, D.C., for Appellant. John Luther Smeltzer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

GIBBONS, J., delivered the opinion of the court, in which ROGERS, J., joined. MERRITT, J. (pp. 36-39), delivered a separate opinion concurring in part and dissenting in part.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Defendant–appellant David Geisen appeals his conviction on three counts of concealing a material fact and making a false statement to the Nuclear Regulatory Commission ("NRC") in violation of 18 U.S.C. §§ 1001 and 2. On appeal, Geisen argues that there was insufficient evidence to support his convictions and that the district court erred by giving a deliberate ignorance instruction and denying a motion to admit evidence of Geisen's rejection of a pre-indictment deferred prosecution agreement. For the following reasons, we find that there was sufficient evidence to support each of Geisen's convictions and that the district court did not err in its instruction or exclusion of evidence. Therefore, we affirm.

I. Factual and Procedural Background

This case arises out of an incident that occurred in 2001 at the Davis-Besse Nuclear Power Station ("Davis-Besse" or "the plant"), which is located on the shores of Lake Erie near Toledo, Ohio, and is owned and operated by FirstEnergy Nuclear Operating Company ("FENOC"). Geisen began work at the plant in 1988 and, by 2000, was manager of design basis engineering. After a safety incident at a similar plant prompted the NRC to require inspections at all like plants by the end of 2001, FENOC successfully petitioned the NRC to permit Davis-Besse to operate without interruption and thus delay inspection until a scheduled refueling shutdown in spring of 2002. Geisen's role in preparing the documents that Davis-Besse submitted to the NRC and presentations given to NRC officials in furtherance of the delayed inspection gave rise to his indictment on and subsequent conviction of three counts of concealing a material fact and making a false statement to a United States agency. During the delayed inspection, Davis-Besse found five cracked nozzle heads and a football-sized cavity caused by boric acid erosion in the head of the reactor. The finding prompted NRC investigations into previous plant inspections and, eventually, the prosecution of Geisen, systems engineer Andrew Siemaszko, and independent contractor Rodney Cook. A second engineer, Prasoon Goyal, and three other Davis-Besse employees signed deferred prosecution agreements.

A. Davis-Besse Nuclear Power Station

Davis-Besse is a two-loop, pressurized water reactor that is composed of a large cylindrical chamber filled with coolant water ("the Reactor Pressure Vessel" or "RPV"). Uranium rods at the core of the vessel fuel the nuclear reaction that heats the coolant water. The nuclear reaction is controlled by introducing boric acid and/or control rods into the reactor vessel. The control rods are inserted through sixty-nine penetration nozzles (tubes that are approximately four inches in diameter) that penetrate through the head of the reactor (approximately ten feet in diameter) into the reactor chamber. There is a gap between the RPV head and reflective metal insulation that encloses closure flanges and studs. The gap is narrowest at the top of the head, where it is only two inches wide. Control rod drive mechanisms ("CRDMs") allow the operators to lower the rods into the reactor to control the rate of the nuclear reaction, and, thus, the energy output. The nozzles are welded onto the vessel head using a J-groove on the underside of the steel head, which is 6.5 inches thick.

The internal walls of the RPV and the underside of the RPV head are covered in noncorrodible stainless steel, but the RPV and the external components are made of carbon steel, which is corrodible by the boric acid in the coolant water if it escapes the RPV. This can happen when the coolant water leaks through the flanges that connect the CRDMs to the nozzles above the RPV head. Davis-Besse had a history of flange leakage and

developed the Boric Acid Corrosion Control Procedure ("BACCP"), which it implements during inspections, to address this problem.

Davis-Besse operates in two-year fuel cycles and, therefore, shuts down the reactor only during the biennial refueling outages ("RFOs"). Davis-Besse was scheduled to conduct RFO13 (the thirteenth RFO conducted at Davis-Besse) in April 2002. In addition to permitting refueling, the RFOs are the primary opportunity for inspections and maintenance that cannot occur while the reactor is in operation. The RFOs at issue in this case are RFO10 (1996), RFO11 (1998), and RFO12 (2000). During an RFO, in order to visually inspect the nozzles and the RPV head, operators must insert a camera through a series of eighteen "weep holes" that are five by seven inches in size and that line the bottom of the RPV head above the head flange connecting the RPV head to the RPV. Because of the limited accessibility of the camera, it is impossible to visually inspect the very top of the RPV head and the nozzles located there. Siemaszko was in charge of inspecting and cleaning the RPV head during RFO12 in 2000. Goyal oversaw this task during RFO10 in 1996 and reviewed the inspection reports following RFO11 and RFO12. Another engineer, Peter Mainhardt, supervised inspection and cleaning during RFO11 in 1998. As of 2001, Goyal and Siemaszko continued to work at Davis-Besse as engineers, and Mainhardt worked for FENOC as an independent contractor preparing for RFO13.

The 1996 RPV head inspection lasted only one hour due to limitations on the technicians' exposure

to radiation. During that inspection, Goyal directed two technicians who were moving a camera on a pole across the vessel head. He watched on a monitor and narrated the camera location based on the "stud hole" numbers (the numbers on the studs between the weep holes). The nozzles were not numbered, so this is the only way to determine and document the condition of each nozzle based on the camera visual. Goyal, in testimony and in a Potential Condition Adverse to Quality report ("PCAQ") submitted to superiors after RFO10, estimated that he was able to inspect fifty or sixty percent of the head area in 1996 and noted that it was difficult to estimate the amount of boron deposit on the head because of the limited visual inspection. In the PCAQ, Goyal attributed the boron deposits to flange leaks. The PCAQ also noted several deposits ranging in color from white to brown to rust. In both the PCAQ and in testimony, Goyal noted that the boron deposits and limited visual access prevented full implementation of the BACCP. Consequently, in the PCAQ, Goyal suggested modifications to the RPV head that would permit better access, such as installing access doors. No such modifications were ever made.

At trial, the government's expert witness, Dr. James Davis, described photographs of the 1998 inspection, noting "rust-colored boric acid deposits coming out of the . . . [weep] holes" and "boric acid deposits around the closure studs." He also stated that "[t]here were several other[indicators of leakages]. One of them was of containment air coolers were getting clogged, fouled with boric acid deposits." The RFO11 PCAQ, signed by Goyal, stated that "most of the head area was covered with an

uneven layer of boric acid along with some large lumps of boric acid." The deposits were again attributed to flange leakage. That PCAQ referred back to the RFO10 PCAQ and the need for corrective action. The 1998 PCAQ also stated that "[t]he reactor vessel head was cleaned as best as we can" and noted that the cleaning was video recorded.

Siemaszko conducted RFO12's RPV head cleaning. The deposits prevented insertion of the camera into five of the weep holes and visually impaired inspection through other weep holes. The deposits also required more elaborate cleaning maneuvers than previous inspections, which had used a vacuum cleaner to remove boron deposits. In 2000, Siemaszko directed the technicians to spray hot, distilled water onto the RPV head to loosen the deposits and to use bars to knock off chunks of deposits and to flush them out through the weep holes. One of the members of the cleaning crew testified that the amount of boron deposits visible in RFO12 was "unlike" any he had seen in previous RFOs and that the deposits left on the RPV head after the cleaning were of great concern to those planning RFO13. Greg Gibbs, a consultant brought to Davis-Besse to prepare for RFO13, reviewed the cleaning tapes of RFO12 and testified that, although there were "large areas . . . that were cleaned to bare metal[,] . . . as you neared the top of the rear insulation where the two-inch gap exists . . . there were areas where there were considerable boric acid deposits, in some cases even solid up to the mirror insulation." Geisen told an NRC investigator in 2002 that he had read a report by Gibbs sometime after October 11, 2001, that discussed Gibbs's findings in reviewing the RFO12 inspection, including that the

RPV head had "boric acid deposits of considerable depth." The RFO12 PCAQ again attributed the increased boron accumulation to flange leakage.

In a 2000 PCAQ, Siemaszko noted that the RPV head should be "free of boron deposits" to adequately inspect the nozzles in accordance with an NRC letter requiring plants to inspect the CRDMs adequately. Siemaszko put the RPV head on a restraint that required action before the plant was put back into operation. Geisen removed the restraint, however, stating that the RPV head would be cleaned of all boron deposits before it was put online. It was not.

B. NRC Bulletin 2001-01

In 2001, small "popcorn" deposits of boric acid were found at the nozzle penetrations of the reactor at the Oconee Nuclear Station in South Carolina, a nuclear plant of similar design to Davis-Besse. Earlier nozzle cracks had been lengthwise, but the 2001 cracks were circumferential (around the nozzle), and one was above the J-groove weld and within the "pressure boundary." This posed a risk that the nozzle would blow out of the vessel head and cause significant loss of coolant and structural threats, including possible plant safety failure. In the early 1990s, the NRC determined that nozzles were susceptible to "stress corrosion cracking" on the nozzles and on the welding but determined that the cracks did not pose an imminent safety threat because the NRC presumed that any leakage would be readily apparent before threatening the structural integrity of the reactor or catastrophic

failure. The leakages occur when coolant escapes the containment vessel within the reactor and either exits the reactor or comes into contact with the hot vessel head. The result is that the coolant flashes to steam and the boric acid within the coolant fluid is left as a deposit on the reactor head near the leak. In 1997, the NRC advised licensees of this type of reactor to develop programs to periodically inspect the vessel head penetrations and look for cracks but, because it was not yet aware of the problem, did not warn about the link between popcorn deposits and circumferential cracking.

FENOC was aware of the risks of circumferential cracking before 2001 because it was a member of an owner's group that addresses problems at plants designed by Babcock and Wilcox, which designed both Oconee and Davis-Besse. Geisen was Davis-Besse's representative to this group. At trial, Geisen testified that he was first involved with nozzlecrack issues in late 2000, after the first cracks were found at Oconee, and that he had given several presentations on the subject beginning in the spring of 2001. Goyal had also sent numerous emails to Geisen and others warning that "head cleaning during outages should be a top priority" and, after the circumferential crack at Oconee was discovered, Goyal sent an email stating that the five nozzles at Davis-Besse located at the center of the RPV head were manufactured in the same way as were all of the cracked Oconee nozzles. However, in June 2001, Geisen approved a memorandum, prepared by Goyal, that concluded that Davis-Besse could postpone inspection of the nozzles until RFO13. The memorandum acknowledged that significant boron leakage from

flanges had impeded "detailed inspection of CRDM nozzles" during RFO12 but calculated that "it would take approximately 2.5 additional years of operation for Davis-Besse to observe the same degradation" as occurred at Oconee.

After receiving notice of the Oconee cracking, the NRC altered its assessment of the risks of even small boron deposits on reactor heads. In light of the Oconee incident and similar experiences in the French nuclear industry, on August 3, 2001, the NRC issued NRC Bulletin 2001-01 ("NRC 2001-01" or "the Bulletin"), entitled "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles." The Bulletin outlined which plants had a "high susceptibility" to nozzle stress cracking and the NRC's criteria indicated that Davis- Besse was among them. The Bulletin also requested information from affected nuclear power stations such as Davis-Besse. The Bulletin stated that such plants "need to use a qualified visual examination of 100% of the . . . nozzles," that the inspection "should be able to reliably detect and accurately characterize leakage from cracking," and that "the effectiveness of the . . . examination should not be compromised by the presence of insulation, existing deposits on the RPV head, or other factors that could interfere with the detection of leakage." Due to the risks, the NRC wanted all high-risk plants such as Davis- Besse to shut down and conduct a complete inspection for nozzle cracks by December 31, 2001. Because of the costs involved in an early shutdown, Davis-Besse wanted to continue operation until its scheduled RFO13 in April 2002.

The Bulletin required plants to provide detailed information about susceptibility to cracking and previous inspections within thirty days. As part of that information, the NRC directed high-risk plants that, "[i]f [the plant's] future inspection plans do not include performing inspections before December 31, 2001, [the plant must] provide [the] basis for concluding that the regulatory requirements discussed in the Applicable Regulatory Requirements section will continue to be met until the inspections are performed." Section 1.d. required all such plants to provide:

> [A] description of the [vessel head penetration] nozzle and RPV head inspections (type, scope, qualification requirements, and acceptance criteria) that have been performed at your plant(s) in the past 4 years, and the findings. Include a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the RPV head for visual examinations.

C. Davis-Besse's Representations to the NRC

In accordance with federal regulations governing the nuclear industry, Davis-Besse was obligated to respond to the NRC Bulletin with "written statements, signed under oath or affirmation." 10 C.F.R. § 50.54(f); *see also* 42 U.S.C. § 2011 *et seq*. Federal regulations also require that all information provided to the NRC "be complete and accurate in all material respects." 10 C.F.R. §

50.9(a). Davis-Besse hired Cook to coordinate the response to NRC 2001-01. Between September 4 and November 30, 2001, FENOC submitted a series of serial letters ("SLs") containing the information requested in the Bulletin. Various conference calls and meetings between FENOC employees and the NRC also took place between September 4, 2001, and December 4, 2001, when the NRC finally permitted Davis- Besse to continue operation until an earlier shutdown for RFO13 in February 2002. The five letters at issue in this case and charged to contain false statements in the indictment against Siemaszko, Geisen, and Cook are: SL 2731, September 4, 2001 (count 1); SL 2735, October 17, 2001 (count 2); SL 2741, October 30, 2001 (count 3); SL 2744, October 30, 2001 (count 4); and SL 2745, November 1, 2001 (count 5). Count 1 also included allegations of concealment of material facts in the other serial letters and during meetings between FENOC staff—including Geisen—and the NRC. Geisen was convicted on the first, third, and fourth counts of the indictment.

In approving Davis-Besse's continued operation until RFO13, the NRC relied on all of the serial letters:

> Based on the information provided in your responses [dated September 4, 2001, as supplemented by letters dated October 17, October 30, November 1, and November 30, 2001] and the information available to the staff regarding the industry experience with VHP nozzle cracking, the staff finds

> that you have provided sufficient information to justify operation until February 16, 2002, at which time you will shut down the [plant] . . . and perform VHP nozzle inspections as discussed in your letter dated November 30, 2001. The commitments contained in your letter dated November 30, 2001, were integral to the staff's finding.

The serial letter submitted on November 30, 2001, SL 2747, was not readily discoverable in the record.

FENOC's first submission to the NRC in response to NRC 2001-01 was SL 2731 on September 4, 2001. Siemaszko was tasked with reviewing the inspection tapes from previous RFOs and providing information in response to NRC 2001-01's section 1.d. inquiry, Cook was in charge of putting together the information, and Goyal was to review the submission. Siemaszko wrote the first draft, which stated that the guidance procedure predating BACCP was used in RFO11 and RFO12, that "[t]he head cleaning was limited by the opening size of the weep holes," and that, during RFO12, "[n]o evidence of nozzle leakage was detected. 95% of the nozzles were inspected." Goyal questioned the ninety-five-percent assertion given the amount of boron visible on the top of the RPV head during RFO12, and Siemaszko subsequently sent another draft asserting that "[n]o visible evidence of nozzle leakage was detected[, m]ajority of nozzles were inspected," and stating that the procedure used was the BACCP. Later, after Cook questioned the meaning of "majority," Siemaszko stated that ninety percent of

the nozzles had been inspected. Goyal expressed concern regarding the ninety-percent claim and the assertion in the draft that all of the CRDMs were inspected given the amount of boric acid deposits obstructing the view.

Nevertheless, the final letter included the statement that "a gap exists between the RPV head and insulation, the minimum . . . is approximately 2 inches, and does not impede visual inspection." The letter also asserted that Davis-Besse's BACCP procedure had been utilized in both inspections and that "[t]he scope of the visual inspection was to inspect the bare metal RPV head area that was accessible through the weep holes to identify any boric acid leaks/deposits." SL 2731 also described the boron deposits discovered during the 1998 inspection as an "uneven layer of boric acid deposits scattered over the head . . . [and] some lumps of boron, with the color varying from brown to white." Of the 2000 inspections, SL 2731 noted that "[s]ome boric acid crystals had accumulated on the RPV head insulation beneath the leaking flanges. These deposits were cleaned (vacuumed)," that "[i]nspection of the RPV head/nozzles area indicated some accumulation of boric acid deposits," and that the RPV head area was cleaned with demineralized water to the greatest extent possible." Referencing the review of the videotaped 1998 and 2000 inspections conducted in May 2001, following Oconee, SL 2731 also noted that "indications such as those that would result from RPV head penetration leakage [like at Oconee] were not evident." SL 2731 also asserted that a full inspection, unimpeded by boric deposits, would take place during RFO13.

Each serial letter sent to the NRC included a "green sheet," which is a cover document listing FENOC employees who contributed to and/or reviewed the document before it was sent to the NRC. There is space for each listed employee to sign and date the letter. Geisen, as design engineering manager, signed and dated the green sheet both on his own behalf and on behalf of his supervisor, Steve Moffitt, who was the director of technical services. Goyal testified that he was uncomfortable signing the green sheet because it misrepresented how thorough the prior inspections and cleanings were, but he eventually did so.

On September 28, 2001, the NRC contacted Davis-Besse to urge it to reconsider its approach to its NRC 2001-01 submissions and to suggest shutting down the plant before December 31, 2001, in order to conduct a proper inspection of the nozzle heads. At trial, Moffitt testified that "December versus April became this issue of great discussion" at Davis-Besse because the difference in consequences of an outage in 2001—several months before the end of a fuel cycle—and at the completion of the cycle would be "quite severe." He stated:

> It wasn't just this outage; it was for the next 20, 40 years you would not be operating at your full tank of gas as you saw it. Then there was fuel [(its availability was questionable)]; there was cost; there was certainly morale, a Christmas outage; there was dose [of radiation] . . . [;] our own sense of confidence.

During an interview with an NRC investigator following RFO13, Geisen stated that the site vice-president was "very upset" by the September 28 call from the NRC, which prompted "all sorts of new work activity."

At this point, management-level personnel, and Geisen in particular, began to take a more active role in the NRC negotiations. Geisen took part in a conference call on October 3, 2001, during which he represented—incorrectly—that 100 percent of the RPV head had been inspected during the RFOs and that boric acid deposits only impeded visual inspection of five or six nozzles. On October 11, 2001, Geisen and other managers gave a slide presentation to NRC staff. Geisen compiled the information for the "facts" slides, but it is unclear whether Geisen or Moffitt presented them. One crucial slide stated that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 11RFO or 12RFO." Moffitt testified that Geisen later determined that the 100-percent statement was only attributable to RFO10 rather than to the later RFOs and decided to correct the error in subsequent submissions.

On October 17, 2001, FENOC sent SL 2735 to the NRC to supplement SL 2731. Geisen, as a "responsible manager," initialed and dated the green sheet for this submission. SL 2735 contained a table detailing the status of each nozzle at each inspection ("nozzle inspection table"). The table indicated whether each nozzle had been recorded and whether leaks were apparent on each nozzle. After the NRC's request for more information following SL 2731,

Geisen had asked Siemaszko to review the inspection videos and to prepare the table.

After receiving Siemaszko's draft table charting the 1998 and 2000 inspections, Geisen told Siemaszko to include the 1996 inspection. Because he had never seen the RPV head in 1996, Siemaszko relied on information from others to complete the table. For the 1998 and 2000 inspections, each nozzle had one of the following notations: (1) "no leak observed," indicating that a visual inspection was sufficient and no video record was needed; (2) "no leak recorded," indicating that the nozzle inspection was recorded on the video; or (3) "flange leak evident," indicating that the nozzles were not visible due to boric acid deposits.

During the NRC investigation into Davis-Besse in 2002, Geisen told investigators that he was responsible for supervising Siemaszko's work on the nozzle inspection table and, according to testimony by the investigator, "[Geisen] said that during . . . an early October time frame, . . . he had viewed portions [of the videos] of the 1996, 1998 and the 2000 reactor vessel head inspections." The version of SL 2735 submitted to the NRC contained the nozzle inspection table as Attachment 2, with a footnote to the 1996 inspections stating that "the entire RPV head was inspected. Since the video was void of head-orientation narration, each specific nozzle view could not be correlated." The letter also stated that "50 of 69 nozzles" were "viewed" in 1998, "45 of 69" were "viewed" in 2000, and that some nozzles were not viewed in 2000 because they were "obscured by boric acid crystal deposits that were clearly

attributable to leaking . . . flanges from the center CRDMs." The letter noted that the visual inspections in 1996, at which time sixty-five of the sixty-nine nozzles were inspected, and in 1998 and 2000 "consisted of a whole head visual inspection" as required by the BACCP. The document also asserted that none of the videos indicated "boric acid chrystal deposits that would have been attributed to leakage from the CRDM nozzle penetrations."

Based on the assertion that all nozzles were leak-free prior to RFO10, as demonstrated in the table, FENOC conducted a risk analysis that determined that the earliest a crack could have developed was May 1996, after RFO10 concluded. In the worst-case scenario, that crack would take seven-and-one-half years to grow to beyond a safe size, and, therefore, Davis-Besse could safely operate until RFO13. This risk analysis formed the basis of Davis-Besse's representations to the NRC that a delayed inspection was safe.

Despite the detailed nozzle inspection table, the NRC was still not satisfied that Davis-Besse could operate safely until the scheduled outage in April 2002. Consequently, on October 24, 2001, Geisen again presented slides to the NRC, including one that stated that "the inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996" and that "no penetration leakage was identified." The NRC, however, remained unconvinced.

On October 30, 2001, FENOC submitted two further serial letters to the NRC, both of which

contained the nozzle inspection table. SL 2741 included a risk analysis and reiterated that, taken together, the inspections in 1996, 1998, and 2000 constituted a "whole head visual inspection" of the "bare head" in accordance with the BACCP. SL 2744 contained still photographs taken from the inspection videos. Siemaszko provided the "representative" photographs, and Geisen wrote the captions. Geisen initialed and dated the green sheets for both letters.

Geisen testified that he asked Siemaszko to collect "representative" photographs and drafted the captions based on previous conversations—unrelated to the drafting of SL 2744—that he had with Siemaszko about the inspections. Geisen also testified that he did not watch the videos in their entirety before compiling the photographs. The government entered evidence, however, suggesting that Geisen had viewed the videos in August 2001 and, at least partially, in preparation for submitting SL 2735.

In an introduction to the 1996 photographs, a caption characterizes the photographs as "representative" and the head as "relatively clean and afford[ing] a generally good inspection." The caption to a photograph showing boric acid deposits at the top of the RPV head states that the deposits could not be removed by mechanical cleaning" because of their "location," but were "in the vicinity of previous leaking flanges and "verified not to be active or wet." Geisen told investigators that Edward Chimahusky, then an engineer in charge of coolant systems at Davis-Besse, provided the information for

that caption, but Chimahusky testified that he was not involved in the response to NRC 2001-01 and that Geisen never consulted him regarding the captions or response to NRC 2001-01. Chimahusky also testified that he had only inspected the flanges on the outside of the reactor head and had not inspected the interior. The photographs included in the letter as "representative" did not show any of the more significant piles of boric acid deposits that the videos contained.

On November 1, 2001, FENOC submitted SL 2745, which contained a "plant specific assessment" expanding on the risk assessment provided in SL 2741. However, despite these submissions, the NRC continued to deny permission to delay the full-head inspection required by NRC 2001-01. In an effort to convince the NRC that delaying inspection was safe, Geisen presented excerpts of the prior inspection videos to NRC staff on November 8, 2001. According to testimony at trial by Dr. Allen Hiser, one of the NRC staff attending the presentation, Geisen showed excerpts of the 1996 video "to confirm that the head . . . was in good condition in 1996" but did not show certain segments of the video that showed large deposits on the RPV head. Hiser testified:

> In retrospect, the good portions I think is what we reviewed. Mr. Geisen had control of the remote . . . and . . . he would fast-forward and jump to various places in the tapes, and we would review maybe for a minute or five minutes just looking at the general

> condition of the head that was visible, and then we'd go maybe forward.

Geisen testified, however, that he had shown the entire 1996 video. Hiser also testified that when he reviewed the same tapes during the NRC investigation in 2002, he saw "a lot more boron than we had expected . . . which was inconsistent really with anything that we had been provided previously." Hiser stated that he "ha[d] no idea" whether Geisen intended to skip over the parts of the video showing significant boron buildup but did know that the excerpts that he showed were not representative. Hiser also stated that Geisen showed portions of the 1996 and 1998 videos but no portion of the 2000 inspection videos. According to Hiser, Geisen said "if you think this tape is bad, the 2000 tape is even worse, so I won't bother to show it to you." Both Geisen and Hiser agreed that Geisen was unable to narrate the videos, and Geisen testified that he had not previously viewed the videos in their entirety and had no time to prepare. Geisen testified that because he was frustrated with his inability to narrate, he arranged for Siemaszko to meet with the NRC to review the videos. Siemaszko did meet with NRC staff on November 14, 2001, to provide assurances that the previous inspections had been sufficient.

As the December 31, 2001, deadline for inspection approached, FENOC managers—including Geisen—met with NRC staff on November 28, 2001, to discuss whether Davis-Besse would have to close. At that meeting, FENOC made additional commitments to expand the scope and bring forward

the timing of RFO13, including proposing an earlier shutdown date of February 16, 2002, and promising to conduct a "100% qualified visual" and "100% [non-destructive examination]" inspection. FENOC also committed to replace the vessel head "at first available opportunity."

D. Procedural Background

During the resulting 2002 inspection, the plant discovered a large cavity in the head of the reactor created by boric acid eroding the steel. The erosion had penetrated through the carbon steel wall, leaving only the 0.24" to 0.38" stainless steel lining of the reactor head,and was located near five cracked nozzles, four of which were at the very top of the reactor head (nozzles 1,2, 3, and 5). The cavity was discovered only by chance when one of the cracked nozzles moved. As a result of the ensuing internal investigation, Davis-Besse fired Siemaszko and Goyal in September 2002 because of their roles in providing inaccurate and misleading information to the NRC in the serial letters.

In January 2006, a grand jury indicted Geisen, Siemaszko, and Cook on five counts of violating 18 U.S.C. §§ 1001 and 2.[1] The indictment charged that, based on the statements made in the serial letters submitted to the NRC and at two public meetings, the NRC permitted Davis-Besse to operate beyond December 31, 2001. Count 1 charged that the three "did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, by

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[1] Cook was indicted on all counts except count 4

tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head." The detailed indictment regarding count 1 listed SL 2731, the other serial letters, and various meetings with NRC authorities between September and December 2001 in which the three defendants participated in various ways. Counts 2 through 4 alleged that Geisen "did knowingly and willfully make, use, and cause others to make and use a false writing," including: (count 2) SL 2735, containing five allegedly false statements; (count 3) SL 2741, containing five allegedly false statements; and (count 4) SL 2744, containing six allegedly false statements. Count 5 alleged that Geisen "did knowingly and willfully cause others to make and use a false writing."

Before the indictment was returned, the government offered Geisen a deferred prosecution agreement ("DPA") that promised that the government would "refrain from seeking an indictment or otherwise initiating criminal prosecution of . . . Geisen" with respect to stated stipulated facts. The DPA required Geisen to "admit[] that between September 3, 2001, and November 28, 2001, he knowingly and deliberately caused false representations to be made to the NRC in the course of attempting to persuade the NRC that [Davis-Besse] was safe to operate beyond December 31, 2001." The DPA also stated that Geisen would waive the statute of limitations for future prosecution based on a breach of the DPA,

cooperate in criminal and administrative proceedings related to the incident, and agree that the stipulated facts could be used against him in any proceeding should he breach the DPA. Geisen rejected the DPA, and he was indicted.

Geisen and Cook moved to sever their trial from that of Siemaszko. The district court granted the motion, and Geisen and Cook were tried jointly in October 2007.[2] The key issue at Geisen's trial was whether he possessed the intent required by § 1001. Geisen, who testified in his own defense, contended that although the statements were false, he did not know that they were false at the time and did not intend to deceive the NRC. As evidence of a lack of intent, Geisen filed a motion *in limine* seeking to introduce evidence of his pre-indictment rejection of the offered DPA. The district court denied the motion.

Among the testimony relied on heavily by the government was that of John Martin, a former NRC investigator who interviewed Geisen in 2002. Martin, relying on his handwritten notes of the interview, testified that Geisen stated that he viewed the inspection videos in August 2001 in connection with preparing for Davis-Besse's interactions with the NRC. This contradicted Geisen's own testimony that he had not reviewed the video tapes at the time that he wrote the captions for the photographs submitted to the NRC in SL 2744. The government also submitted into evidence

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[2] We decided Siemaszko's appeal this day in a separate opinion. *See United States v. Siemaszko*, No. 09-3167, — F.3d — (6th Cir. 2010).

numerous emails that were addressed or copied to Geisen from Goyal discussing past inspections at Davis-Besse, similarities between Oconee and Davis-Besse, and the need to modify the RPV head to permit better access during inspections and cleaning. In one such email, Goyal noted that Davis-Besse's was the only Babcock-and-Wilcox-designed reactor that did not have access doors on the reactor head.

To demonstrate the falsity of the statements included in the serial letters, the government introduced the inspection videos and summaries of the prior cleanings into evidence through the expert testimony of Melvin Holmberg. Holmberg, who conducted an audit of the inspections and created a "map" of the RPV head identifying each nozzle by number, walked the jury through the various videos. He identified which nozzles were visible during each inspection and to what extent the view of each nozzle was sufficient to enable the "qualified visual examination" ("QVE") required by NRC 2001-01. In the diagrams he produced, he also identified which of those nozzles were designated by FENOC as "no leak observed," *i.e.*, "visual inspection satisfactory, no video record required," and which were designated as affected by flange leakages. Summarizing Holmberg's results, the government included in its brief before this court the following table illustrating how many of the nozzles were visible for inspection:

	Inspector	Nozzles Visible (total out of 69)	Nozzles Subject to QVE (total out of 69)
RFO10 (1996)	Goyal	51	28
RFO11 (1998)	Mainhardt	43	18
RFO12 (2000)	Siemaszko	23	5

The government claimed that this was inconsistent with the assertions made in SL 2735 that "50 of 69 nozzles" were visibly inspected in 1998 and "45 of 69" were visibly inspected in 2000, although the serial letter did not differentiate between QVE and "viewed."

At the end of the trial, the government asked for and was granted a jury instruction on deliberate ignorance. After three days of deliberations, the jury reached a verdict of acquittal as to Cook and informed the district court that it had reached only a partial verdict as to Geisen. After hearing an *Allen* charge, the jury returned a guilty verdict on counts 1, 3, and 4. The district court denied a motion for judgment of acquittal and new trial, noting that, "[a]lthough a close case, the evidence presented, including testimony from the Defendant himself, when viewed cumulatively, constitutes sufficient direct and circumstantial evidence upon which a reasonable jury, utilizing the standard 'beyond a reasonable doubt,' could have based a finding of knowledge and intent." Geisen was sentenced to three years of probation for each count, to run concurrently, and was fined $7,500, directed to

perform 200 hours of community service, and prohibited from working in the nuclear industry during his period of probation. Geisen timely appealed.

II. Deliberate Ignorance Instruction

We review challenges to a district court's jury instruction for abuse of discretion. *United States v. Prince*, 214 F.3d 740, 761 (6th Cir. 2000). "A trial court has broad discretion in crafting jury instructions and does not abuse its discretion unless the jury charge 'fails accurately to reflect the law.'" *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007) (citations omitted). Thus, we may reverse the jury's conviction "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999) (internal citations and quotation marks omitted).

We have stated that a deliberate ignorance instruction is warranted to "prevent[] a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." *United States v. Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983). However, we have cautioned that this instruction should be used sparingly because of the heightened risk of a conviction based on mere negligence, carelessness, or ignorance. *See United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995) (warning courts not to use the instruction "indiscriminately"); *see also* Pattern Criminal Jury Instructions for the Sixth Circuit § 2.09. A deliberate ignorance

instruction is properly given, therefore, when there is evidence supporting an inference of deliberate ignorance. *See United States v. Lee*, 991 F.2d 343, 351 (6th Cir. 1993).

The district court properly instructed the jury that it could only find Geisen guilty under a deliberate ignorance theory if it was "convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts . . . or included false statements." *See id.* at 350–51 (upholding the use of the same instruction). The district court further cautioned the jury that "[c]arelessness, or negligence, or foolishness on [the defendant's] part is not the same as knowledge and is not enough to convict."

Geisen also argues that the instruction confused and misled the jury and permitted it to convict on the basis of negligence rather than criminal intent to deceive. Geisen argues that the risk of confusion is greater than usual in this case because the government entered considerable evidence that Geisen was negligent in preparing and reviewing the submissions to the NRC. We find Geisen's argument unavailing. In giving the instruction to the jury, the district court was very careful to use Pattern Jury Instruction 2.09. The court also gave a limiting instruction. We have held that Pattern Jury Instruction 2.09 is an accurate statement of the law. *Id.* at 351. And, in *Mari*, we found that cautionary language such as that used by the district court in this case "forecloses the possibility of th[e] error" that a conviction is

improperly based on negligence or carelessness. 47 F.3d at 785.

Quoting the Tenth Circuit, Geisen also argues that it is illogical to give the deliberate ignorance instruction since the government maintains that the evidence supports actual knowledge based on Geisen's knowledge of the contents of the Goyal emails. *See United States v. Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991) ("If evidence proves the defendant actually *knew* an operant fact, the same evidence could not *also* prove he was *ignorant* of that fact."). *Mari* forecloses this argument because it held that improperly giving the "deliberate ignorance" instruction is at most harmless error when the prosecution presented sufficient evidence of actual knowledge. 47 F.3d at 786 (citing *Griffin v. United States*, 502 U.S. 46, 55–56 (1991) (holding that giving an instruction based on unsupported grounds is harmless as a matter of law)); *see also United States v. Springer*, 262 F. App'x 703, 706 (6th Cir. 2008) (finding the same argument "hard to swallow" given the defendant's argument at trial that he had no actual knowledge). In so holding, the *Mari* court

> recognized that [it] must assume that the jury obeyed the language of the district court's instructions. The words of the instruction required the jury to find beyond a reasonable doubt that the defendant was deliberately ignorant before it could convict on that ground. Therefore, even if there had been insufficient evidence to support a

> deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance. Thus, another theory must have formed the basis for the conviction.

United States v. Monus, 128 F.3d 376, 390–91 (6th Cir. 1997) (citing *Mari*, 47 F.3d at 785–87) (internal citations omitted).

Because the jury instruction given by the district court in this case was not an incorrect statement of the law but rather at worst—if we take Geisen's arguments at face value—"one that is simply not supported by the evidence," it was not prejudicial to Geisen. *See Mari*, 47 F.3d at 786 (quoting *Griffin*, 502 U.S. at 59).[3] The district court, therefore, did not abuse its discretion by giving a "deliberate ignorance" instruction and that no prejudice to Geisen resulted from that instruction. Moreover, we find below in discussing the sufficiency of the evidence that Geisen's convictions can be upheld under an actual knowledge theory. Therefore, any possible error in giving the deliberate ignorance instruction was harmless. *Id.* at 786.

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[3] In distinguishing his case from *Mari*, Geisen argues that *Mari* misapplied *Griffin* and relies on cautionary language from this and other circuits regarding the use of the deliberate ignorance instruction. He also points to the district court's hesitance to determine whether such an instruction was appropriate in this case as evidence that the instruction was improper. We are not persuaded. *Mari* remains controlling law in this circuit, and the district court's observation that this was a close issue does not necessarily render his ultimate determination of the issue arbitrary or capricious.

Even if Geisen's convictions cannot be sustained under an actual knowledge theory, the evidence was sufficient to demonstrate that he acted with deliberate ignorance. In order to constitute a violation of § 1001, a false statement must be made to or a material fact concealed from the NRC "knowingly and willfully." 18 U.S.C. § 1001. Consequently, "[t]o establish a violation of § 1001, the Government must prove beyond a reasonable doubt that the statement was made with knowledge of its falsity," *United States v. Yermian*, 468 U.S. 63, 64 (1984), and an "intent to deceive," *United States v. Ahmed*, 472 F.3d 427, 433 (6th Cir. 2006). Geisen contends that with respect to all three convictions, the government failed to prove either knowledge or intent to deceive. He argues that in his supervisory role, he relied in good faith on information given to him by those with first-hand knowledge in compiling and reviewing the submissions to the NRC and making presentations to NRC staff. He also argues that the government improperly imputes to him knowledge of anything that FENOC knew as well as FENOC's motive.

Geisen argues that the government's approach to deliberate ignorance constitutes conviction on the basis of negligence—what Geisen *should have* known—rather than because he "*consciously* attempted to escape confirmation of conditions or events he strongly suspected to exist." *United States v. Skilling*, 554 F.3d 529, 548 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009) (quoting *United States v. Lara-Velasquez*, 919 F.3d 946, 951 (5th Cir. 1990), and declining to find the instruction improperly given). We disagree.

The government identified several representations that it argues "demonstrate a deliberate disregard for the truth," thereby suggesting that Geisen was "deliberately avoiding culpable knowledge." First, Geisen testified that he compiled information for slides presented to the NRC at a meeting on October 11, 2001. One of the slides represented that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 11RFO or 12RFO." Geisen testified that the information for that slide came from Siemaszko's review of the tapes, but acknowledged that Siemaszko had not completed his nozzle inspection table by the time the slides were composed. The government argues that "this means that Geisen personally vouched for the comprehensiveness of the inspections, without any basis for doing so." Second, Geisen testified that he did not recall ever speaking "face-to-face" with Siemaszko regarding Siemaszko's assertion that the 1996 inspection had visualized sixty-five of sixty-nine nozzles, despite Geisen's knowledge of the considerable deposits remaining on the RPV head and the impediments to previous inspections. Third, Geisen testified that he did not consult Siemaszko or any systems engineers while drafting the captions for the photographs submitted in SL 2744 but rather relied on his memory of "previous conversations." Taken together with his testimony that he never reviewed the inspection videos on his own, the government argues that "[t]his left the jury to understand that Geisen interpreted images and made critical representations about past inspections—*e.g.*, that certain boric acid deposits were 'verified not to be active or wet'—without any confirmed basis for doing so."

In conclusion, the government presented ample evidence from which a rational jury could infer that Geisen deliberately chose not to inform himself in preparing the submissions to the NRC. Testimony and documents entered into evidence suggested that Davis-Besse's representations to the NRC in the serial letters, meetings, and conference calls played a leading role in convincing the NRC that it would be safe to keep Davis-Besse in operation beyond December 31, 2001; that Geisen admittedly put little effort into informing himself and confirming the assertions he made to the NRC in the serial letters and in person at meetings; that there were significant and readily apparent inconsistencies between the information Geisen received from Siemaszko and others and the actual state of the RPV head; that Geisen possessed knowledge of the nature of the plant's prior inspections from his involvement in reviewing procedures in the wake of the Oconee incident; and that the plant's management desired to keep the plant in operation until RFO13. Consequently, the district court's instruction was not improper.

III. Sufficiency of the Evidence Claims

We review a district court's refusal to grant a motion for judgment of acquittal and a defendant's claim of insufficiency of the evidence *de novo*. *See United States v. Gunter*, 551 F.3d 472, 482 (6th Cir. 2009) (sufficiency of the evidence claims); *United States v. Kone*, 307 F.3d 430, 433 (6th Cir. 2002) (motions for acquittal). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also United States v. Dedman*, 527 F.3d 577, 592 (6th Cir. 2008).

All conflicts in the testimony are resolved in favor of the government, and every reasonable inference is drawn in its favor. *United States v. Bashaw*, 982 F.2d 168, 171 (6th Cir. 1992). In considering the claim, "we do not weigh the evidence presented, consider the credibility of witnesses, or substitute our judgment for that of the jury." *United States v. M/G Transp. Servs., Inc.*, 173 F.3d 584, 588–89 (6th Cir. 1999) (citing *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993)). This standard applies even if the evidence is purely circumstantial. *See Kone*, 307 F.3d at 434. Consequently, in raising a sufficiency of the evidence claim, a defendant "bears a very heavy burden." *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999).

In order to convict a defendant for making false statements to a federal agency in violation of 18 U.S.C. § 1001, the government must prove: "(1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency." *Dedman*, 527 F.3d at 598 (quoting *United States v. Lutz*, 154 F.3d 581, 587 (6th Cir. 1998)). Only the last element is undisputed. When, as in the instant case, the indictment alleges multiple fraudulent

statements for each count, this court must "uphold a conviction where there was sufficient evidence for *at least one* of the alleged false statements" for each count. *Id.* (emphasis added). After reviewing the extensive record in this case, we find that the government presented sufficient evidence to sustain Geisen's convictions on all three counts.

A. Count 3—Making False Statements in SL 2741

Count 3 of the indictment charged Geisen with "knowingly and willfully mak[ing], us[ing], and caus[ing] others to make and use a false writing, that is, [SL 2741], knowing that it contained the following material statements, which were fraudulent" to the NRC in violation of §§ 1001 and 2. The allegedly false material statements were:

> 1. "[d]uring 10RFO, 65 of 69 nozzles were viewed" . . . ;
> 2. "[i]n 1996 during 10 RFO, the entire RPV head was inspected" . . . ;
> 3. "[s]ince the [RFO10] video was void of head orientation narration,
> each specific nozzle view could not be correlated" . . . ;
> 4. "[t]he inspections performed during the 10th, 11th, and 12th [RFOs] . . . consisted of a whole head visual inspection of the RPV head in accordance with the [BACCP]" . . . ; and
> 5. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean

> head for evaluating future inspection results" . . . .

We must uphold the conviction on this count if there was sufficient evidence for a jury to convict based on any one of these five allegations. *See Dedman*, 527 F.3d at 598.

SL 2741, submitted on October 30, 2001, in conjunction with SL 2744, provided a risk analysis based on the assumption that a "whole head visual inspection" of the "bare head," excepting only four nozzles, had been conducted in accordance with the BACCP in 1996. Geisen testified that he asked Siemaszko to expand the nozzle inspection table to include the 1996 inspection because he realized that the 1998 and 2000 inspections even taken together did not amount to a full visual inspection of the reactor head. Thus, Geisen was aware of the paramount importance of representing to the NRC that the 1996 inspection was complete for sixty-five of the sixty-nine nozzles. Had the inspection been less complete, the risk analysis would be inaccurate, and Davis-Besse could not assure the NRC that it had visually inspected the "entire head" as recently as 1996.

Testimony also suggested that Davis-Besse's managers, including Geisen, were under considerable pressure from their superiors to keep the plant in operation. Geisen's supervisor, Moffitt, testified that FENOC was very concerned that Davis-Besse continue operating as scheduled until spring 2002. After SL 2731, FENOC's first response to NRC 2001-01, proved unsuccessful in securing the NRC's permission to continue operations, Geisen

took a more active role in coordinating and overseeing Davis-Besse's response to NRC 2001-01. Moffitt, Geisen's direct supervisor, testified that "December versus April became this issue of great discussion" and that the economic, technical, and morale repercussions of halting operation before the completion of the cycle would be "quite severe." Geisen himself testified that the site vice-president was "very upset" when SL 2731 was unsuccessful, which created "all sorts of new work activity." Evidence presented at trial that Geisen played a direct role in drafting and reviewing SL 2735 by directing Siemaszko and Goyal demonstrates that Geisen was directly involved in Davis-Besse's efforts to convince the NRC to allow the plant to continue operating until RFO13. Geisen also drafted the text of SL 2744. A rational jury, therefore, could have concluded that Geisen had a motive and intent to deceive the NRC in order to keep the plant in operation through spring 2002.

The government also presented sufficient evidence at trial for a rational jury to find that Geisen knew that SL 2741 misrepresented the success of the prior inspections and the extent of the cleaning of the RPV head. First, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Geisen knew that the inspection in 1996 had not been of the "entire head" and had not covered sixty-five of the sixty-nine nozzles as alleged in SL 2741. Furthermore, a rational jury could find that there was sufficient evidence that Geisen knew that the BACCP had not been utilized in the inspections because of the extent of the deposits noted in the 2000 PCAQ that he had reviewed and because of Goyal's emails to him.

Second, Geisen testified that as plant representative to the Babcock and Wilcox owner's group, he was aware of the risks of nozzle cracking and had given presentations on the risks associated with the cracking in early 2001. He was also involved in reviewing a June 2001 memorandum that stated that while the plant could operate safely until RFO13, significant boron deposits that remained on the RPV head following RFO12 must be addressed. Furthermore, because of his involvement in reviewing the 2000 PCAQ and canceling the operational restraint imposed by Siemaszko, Geisen was aware that the whole head had not been cleaned during the RFO12 process in 2000 as represented in SL 2741. Thus, a rational jury could have determined that Geisen knew that SL 2741's assertion that, "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results" was materially misleading. Finally, the jury could have credited Martin's testimony that Geisen reviewed the inspection videos personally in August 2001, and, therefore, knew that there was narration on the 1996 video, contrary to representations that there was none in SL 2741, and that fewer than sixty-five nozzles had been visible.

Therefore, although a rational jury would have had to rely on largely circumstantial evidence to infer Geisen's knowledge of the falsity of the statements in SL 2741, given the evidence presented, one could have found that Geisen knew that certain assertions in SL 2741 were false and incomplete and, knowing this, signed and submitted

SL 2741 to the NRC with the intent to represent the past inspections as morecomplete than they had been. Therefore, there was sufficient evidence for a jury to find Geisen guilty of violating §§ 1001 and 2 as alleged in count 3.

B. Count 4—Making False Statements in SL 2744

The government's case on count 4 is perhaps the strongest against Geisen, and we find that a rational jury could find all elements of § 1001 beyond a reasonable doubt. Count 4 of the indictment charged Geisen with "knowingly and willfully mak[ing], us[ing], and caus[ing] others to make and use a false writing, that is, [SL 2744], knowing that it contained the following material statements, which were fraudulent" to the NRC in violation of §§ 1001 and 2. The allegedly false material statements were:

> 1. "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination" . . . ;
> 2. "[s]ince the [RFO10] video was void of head orientation narration, each specific nozzle view could not be correlated by nozzle number" . . . ;
> 3. "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection" . . . ;
> 4. "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but

> was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint," whereas, as the defendants then well knew, no action had been taken in 1996 to verify whether the boric acid was active or wet and, thus, not a corrosion threat;
>
> 5. "these attached pictures are representative of the condition of the drives and the heads" during the inspection during [RFO11] . . . ;
>
> 6. "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas, as the defendants then well knew, other images from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle number 19.

We must uphold the conviction on this count if we conclude that there was sufficient evidence for a jury to find any one of these six allegations. *See Dedman*, 527 F.3d at 598. The evidence is strongest with respect to the first, fourth, fifth, and sixth statements, and so we limit our review to those allegations.

SL 2744, for which Geisen wrote the captions to the "representative" photographs, is the most direct evidence of Geisen's participation in

representing to the NRC that it was safe to continue operating the reactor because Davis-Besse had conducted adequate and thorough inspections in 1996, 1998, and 2000. Unlike in the previous serial letters, which Geisen did not directly draft, the captions were his own work product, and he testified that he did not consult Siemaszko, Goyal, or any other individual directly involved in the past inspections while drafting the captions. There is no question, therefore, that the alleged statements were made by Geisen and caused to be submitted to the NRC by him. In testimony, Geisen also admitted that the statements were false, although he denied that he knew that at the time that he wrote them. Therefore, the only element of § 1001 that remains is whether Geisen submitted those statements knowing that they were false.

Geisen attempts to shift blame for the misrepresentations and false statements in SL 2744 onto Siemaszko, stating that he had told Siemaszko to collect "representative" photographs and that he had based the captions on information from conversations with Siemaszko that had taken place previously but not specifically relating to the photographs. The government argues that Geisen "created" the captions by "interpret[ing] images and ma[king] critical representations about past inspections . . . without any confirmed basis for doing so."

Evidence presented at trial suggests that Geisen did task Siemaszko with selecting representative photographs of the inspections. It is undisputed that the photographs were not

representative and showed far less boric acid buildup than existed. Given testimony presented at trial that Geisen had reviewed the inspection tapes in August 2001, the June 2001 memorandum, and the 2000 PCAQ in which Siemaszko had put a hold on the reactor due to the considerable deposits, a rational jury could find that Geisen knew of the greater extent of the boric acid deposits and the limited scope of the inspections by the time that SL 2744 was submitted on October 30, 2001. If Geisen had seen the prior inspection videos or read the reports, he would have known that the photographs were not representative of either the prior inspections or the current condition of the RPV head. A rational juror could therefore have found that Geisen's captions indicating that the photographs were "representative" of the state of the RPV head were knowingly false and misleading.

Geisen's attempt to blame Siemaszko for the content of the captions is also unavailing. Geisen testified that he wrote the captions based on past conversations with Siemaszko not related to the captioning, that he did not ask Siemaszko or others involved personally in the inspections to help with drafting the captions, and that he had not personally viewed the video tapes before writing the captions. The government also argues that the statement that the deposits were "verified" as not wet or active was unconfirmed because Geisen did not ask anyone about the state of the deposits and did not have firsthand knowledge. Geisen testified that this caption "was based upon a conversation I had had with [Siemaszko] that he was reflecting back on a conversation he had with somebody else." In prior statements to investigators, Geisen also attempted

to blame Chimahusky for providing the information for the same caption. Chimahusky testified that he did not recall being asked about the 1996 inspections, and Goyal testified that he was not asked to help with this caption.

Additionally, as discussed previously with respect to count 3, evidence suggests that Geisen understood by October 30, 2001, that the NRC was very concerned with the thoroughness of the 1996 inspection and that his superiors wanted the plant to remain in operation until into the spring of 2002. Given this evidence of knowledge and motive to deceive and undisputed evidence that the photographs and captions were misleading, a rational jury could find that Geisen submitted SL 2744 to the NRC knowing that it contained false and misleading statements. Therefore, a rational jury could find that there was sufficient evidence to support a conviction of violating §§ 1001 and 2 on this count.

C. Count 1—Concealing Material Facts

Count 1 of the indictment charged Geisen with "knowingly and willfully conceal[ing] and cover[ing] up, and caus[ing] to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the [NRC], to wit, the condition of Davis-Besse's [RPV] head, and the nature and findings of previous inspections of the [RPV] head" in violation of §§ 1001 and 2. The indictment specified ten allegations of concealment of a material fact:

1. causing SL 2731 to be forwarded to the NRC knowing that it

> a. "deliberately omitted critical facts concerning the inspections and limitations on accessibility" and
>
> b. "falsely stated that the inspections complied with . . . DavisBesse's [BACCP];"

2. falsely stating during an October 3, 2001, conference call with the NRC that a "100% inspection" of the RPV head with the exception of some areas took place in 2000;

3. representing the false fact that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type deposits using video recordings from 11RFO or 12RFO" at a meeting with the NRC on October 11, 2001;

4. causing SL 2735 to be forwarded to the NRC, which falsely represented that the entire RPV head had been inspected in 1996;

5. making false representations about the scope of the 1996 inspection, that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type born deposits using video recordings from 10RFO, 11 RFO or 12RFO," and that videos or eyewitness accounts confirmed

this at a meeting with NRC staff on October 24, 2001;

6. causing SL 2741 to be forwarded to the NRC repeating false statements in SLs 2731 and 2735;

7. causing SL 2744 to be forwarded to the NRC with photographs falsely represented as "representative" of the condition of the RPV head;

8. causing SL 2745 to be forwarded to the NRC repeating false statements from SLs 2735 and 2741;

9. giving a presentation to the NRC with false information from SLs 2735 and 2741 to argue that the plant should stay open until RFO13; and

10. giving a presentation to the FENOC Company Nuclear Review Board that falsely represented that a qualified visual inspection was performed in 1996 on all but four nozzles.

We need not analyze all ten allegations in the indictment individually because we must uphold Geisen's conviction on this count if we find that there was sufficient evidence for a jury to find any one of the ten assertions. *See Dedman*, 527 F.3d at 598. We note first that because we have already found that there was sufficient evidence for a rational jury to find that Geisen caused SLs 2741 and 2744 to be forwarded to the NRC, knowing them to contain false statements and with intent to deceive, there was sufficient evidence to support a conviction on count 1 based on the sixth and seventh allegations.

However, even without relying on those statements, the government presented sufficient evidence to sustain this conviction. After the NRC's negative response to SL 2731, Geisen met with NRC staff on at least five occasions—on October 3, 11 and 24 and November 8 and 28, 2001—either via conference call or in person. The purpose of the meetings and conference calls was to reassure the NRC and to provide further information demonstrating the thoroughness of previous inspections.

During the October 3 call, Geisen stated that there had been a 100-percent inspection of the head barring five or six nozzles and, at an October 11 meeting, a slide authored by Geisen asserted that video recordings from RFO11 and RFO12 showed that the nozzles were free of boric acid. Geisen admitted that he realized that there was not a complete visualization from RFO11 and RFO12 directly after the meeting—and thus before submission of SLs 2735, 2741, and 2744—but decided to correct the error later. It was at this juncture that the 1996 inspection became critical in order to represent that the nozzles had been fully inspected as recently as 1996.

The circumstantial and direct evidence discussed in our analysis of counts 3 and 4 with respect to Geisen's knowledge of the state of the RPV head and the inspections could convince a rational jury that he knew that these representations were false by October 3 and 11. For similar reasons, a rational jury could find that Geisen knew that the information that he presented to the NRC at later

meetings via slides authored by him knowingly included false and misleading statements. For example, a slide presented on October 24, 2001, stated that "the inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996" and that "no penetration leakage was identified." A jury, therefore, could convict Geisen on count 1 based on the misleading statements he made in meetings and calls with the NRC.

Geisen also argues that he bears no criminal responsibility for SL 2731 because he was not involved in its drafting and his only action was to sign off after the chain of review indicated on the green sheets was complete. It is undisputed that he signed the green sheet for SL 2731 on behalf of himself on August 28 and on behalf of his supervisor on August 30. Geisen admitted that his responsibility with respect to SL 2731 was to review the document. He testified that, in doing so, "[he] would have gone through the document looking for those pertinent sections that deal with the design of the plant and make sure that they sounded right to [him] as well as verify that the appropriate people from [his] staff were involved with the reviews and signed off on it."

There is also both direct and circumstantial evidence that Geisen was aware of the limitations of previous inspections such that a rational jury could infer that he knew that the representations regarding those inspections in SL 2731 were false or misleading. For example, in the PCAQ for the the 2000 inspection, Siemaszko put the reactor on a

restraint until the boron deposits were removed. Geisen added a page to the PCAQ removing the restraint because the RPV head was due to be cleaned, although it never was. In June 2001, Geisen signed off on a memorandum prepared by Goyal that stated that the plant was safe to operate until RFO13 but that considerable boron deposits had impeded inspection of the nozzles in RFO12. As part of that review, in light of Oconee, Goyal sent Geisen emails indicating that head cleaning should be a priority and that the center nozzles at Davis-Besse were of the same type as those that cracked at Oconee. While FENOC was drafting SL 2731, on August 11, 2001, Goyal sent another email to Geisen and to others in which he stated: "I indicated tha[t] we plan for 100% volumetric examination even if we do not commit to NRC. . . . It was pointed out that we can not [sic] clean our head thru the mouse holes and Andrew Seimaszko [sic] is requesting 3 large holes be cut in the Service Structure for viewing and cleaning." This suggests not only that Geisen was involved in making sure that SL 2731 was sent to the NRC, but also that he was aware of the considerable impediments to previous inspections and that the inspections had not been conducted "in accordance with" the BACCP, as stated in SL 2731.

In conclusion, from this evidence, *inter alia*, a rational juror could find that Geisen knew that statements—which he reviewed—in SL 2731 were false and concealed the extent of the limitations to previous inspections and that he permitted those material statements to be sent to the NRC as such. We therefore affirm Geisen's conviction on count 1.

IV. Exclusion of Evidence Claim

We review a district court's decision to exclude evidence for abuse of discretion. *United States v. Davis*, 490 F.3d 541, 546 (6th Cir. 2007). Furthermore, "[we] review[] *de novo* the [district] court's conclusions of law and review[] for clear error the court's factual determinations that underpin its legal conclusions." *United States v. Jenkins*, 345 F.3d 928, 935 (6th Cir. 2003) (citations omitted). We have found that these two standards of review are not in conflict, as "'it is an abuse of discretion to make errors of law or clear errors of factual determination'" in evidentiary rulings. *United States v. Baker*, 458 F.3d 513, 517 (6th Cir. 2006) (quoting *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005)); *see also United States v. Ganier*, 468 F.3d 920, 925 (6th Cir. 2006) (affirming the standard of review quoted in *Baker*).

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks and citation omitted). Although this guarantee includes the right "to present relevant evidence," that evidence is subject to "reasonable restrictions" and must "bow to accommodate other legitimate interests in the criminal trial process." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (internal quotation marks and citation omitted). The Federal Rules of Evidence, including Federal Rule of Evidence 403, are such reasonable restrictions. *See Varner v. Stovall*, 500 F.3d 491, 499 (6th Cir. 2007). Furthermore, a district court enjoys "'wide discretion in determining

the admissibility of evidence under the Federal Rules . . .' [and t]his is particularly true with respect to Rule 403." *Sprint/United Mgt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)).

Geisen argues that the district court improperly denied his motion to enter into evidence his rejection of a pre-indictment DPA. Geisen maintains that the DPA was probative of his state of mind because an innocent person is more likely to reject a DPA than is a guilty one. He further asserts that the rejection was necessary to counter impeachment evidence offered by the government regarding prosecution agreements offered to four testifying witnesses.

The district court addressed these arguments twice, once during pretrial conference, at which point the court tentatively expressed its intent to deny Geisen's motion, and again during trial proceedings, when the court denied the motion *in limine*. In denying the motion, the district court first dismissed Geisen's contention that the impeachment evidence of other witnesses necessitated inclusion of Geisen's rejection of the same DPA because such impeachment evidence is routine "for the purpose of disclosing it to the jury so that they can judge whether the testimony is in exchange for the offer and acceptance by the government and the witness, not for the purpose of denial of guilt." The district court went on to find that "there are more reasons to keep it out than to permit it to come in." While acknowledging that the evidence may have some probative value, the district court noted that the

jury's weighing of the DPA was more complicated than the weighing of guilt or innocence because, as other witnesses testifying about offered DPAs admitted, accepting a DPA and the attendant statement of facts would affect an individual's "viability to be employed within the nuclear industry." Furthermore, the district court found that admitting the DPA would "open the door to cross examination on what he was told by his counsel; . . . what he understood a [DPA] to mean for him, . . . including his position for future employment in the nuclear industry and other employment[, and] his perception and maybe the discussion with counsel about . . . [the weakness of the government's case]." The district court concluded that "[t]here are just too many variables other than the explanation which would be permitted to the defendants on closing argument that that represented his denial of guilt."

Geisen rests his argument heavily on a Second Circuit case holding that evidence of a rejection of an immunity offer is relevant to a defendant's innocent state of mind. *United States v. Biaggi*, 909 F.2d 662, 690–91 (2d Cir. 1990); *see also United States v. Maloof*, 205 F.3d 819, 824 (5th Cir. 2000) (following *Biaggi*). The *Biaggi* court held that evidence of such a rejection is admissible if not otherwise "outweighed by the danger of unfair prejudice, confusion, or delay" under Rule 403. 909 F.2d at 691. The Eighth Circuit, however, has declined to adopt *Biaggi* in a case in which the defendant sought to introduce evidence of a rejection of a plea agreement. *United States v. Greene*, 995 F.2d 793, 798 (8th Cir. 1993). The *Greene* court found controlling the reasoning of *United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976), which held that government proposals

concerning pleas are inadmissible based on the rationale of Federal Rule of Evidence 408. *Id.* (noting that Rule 408 "relates to the general inadmissibility of compromises and offers to compromise" (quoting *Verdoorn*, 528 F.2d at 107)). The Eighth Circuit found that there was "[no] relevant distinction between plea agreements and immunity agreements except, perhaps, as to the weight that jurors might give to them" and that "all the defendant is offering is a prior statement consistent with his plea of not guilty[, which is] hearsay, except in narrow circumstances."[4] *Id.* (citing Fed. R. Evid. 801(d)(1)(B)). As the government points out, "mak[ing] evidentiary use of [Geisen's] rejection of the offer—as opposed to the offer itself—[would be] difficult (if not impossible) to entangle."

We have not previously addressed this question, and find no reason to reach it now because, on the facts of this case, the exclusion of evidence of Geisen's rejection of the DPA did not constitute an abuse of discretion by the district judge necessitating reversal even under *Biaggi*. The *Biaggi* court held that "the probative force of a rejected immunity offer is clearly strong enough to render it relevant" because an immunity offer would "preclude *all* exposure to a conviction and its consequences." 909 F.2d at 691–92 (emphasis added). A *deferred* prosecution agreement, however, does not foreclose all exposure to a conviction and its consequences in

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[4] The Eighth Circuit also noted, however, that because the defendant did not intend to testify, there would be no opportunity to cross-examine him regarding the agreement. This concern is not present in this case, because Geisen did take the stand and could have been cross-examined.

the same way, especially given the implications for Geisen's employment. Refusing to accept the DPA, therefore, is not as probative of a "consciousness of innocence" as the immunity offer at issue in Biaggi. The *Biaggi* court itself asserted that a plea agreement would be less probative and declined to reach whether a district court would be required to admit evidence of refusal of such an agreement. *Id.* at 691.

Furthermore, and more importantly for the case before us, the *Biaggi* court acknowledged that "[i]t is a closer question whether the District Judge exceeded her discretion under [Rule 403] to bar relevant evidence [of the immunity offer] whose probative value is outweighed by the danger of unfair prejudice, confusion, or delay." *Id.* The *Biaggi* court "recognize[d] the latitude of a district judge in making Rule 403 determinations" but found that the district judge had based her Rule 403 determination on the erroneous assumption that the immunity offer was not at all relevant. *Id.* In the instant case, however, the district court acknowledged that Geisen's rejection of the DPA may be probative of an innocent state of mind, but found the probative value outweighed by the considerable avenues of inquiry that would be opened by admitting the evidence. The court also expressed concern that prejudice to the government would result because "too many variables [existed] other than the explanation which would be permitted to the defendants on closing argument that that represented his denial of guilt" and that much relevant testimony would be privileged. The district court's reasoning for denying the motion *in limine*, therefore, does not demonstrate an abuse of discretion in the same

manner as it did in *Biaggi*. We therefore find no error in the district court's exclusion of evidence of Geisen's rejection of the DPA.

V.

For the foregoing reasons, we affirm Geisen's conviction on counts 1, 3, and 4 of the indictment.

CONCURRING IN PART AND DISSENTING IN PART

MERRITT, Circuit Judge, concurring in part and dissenting in part. Four government witnesses were allowed, over the objection of the defendant, Geisen, to testify in great detail about their negotiations with the government to escape prosecution while Geisen was denied the right to testify about his response to the government's offer of the same deal. The court's rulings seem contrary to a number of principles of relevancy usually observed in criminal trials: Rule 401 of the Federal Rules of Evidence provides a broad and inclusive definition of "relevant evidence."[1] Rule 408 allowing "offers to compromise" in criminal cases would appear to allow evidence of the government offer and Geisen's response.[2] When a party "opens the door" by offering proof concerning offers of compromise, the

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[1] 1Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[2] 2Rule 408. Compromise and offers to compromise.

(a) Prohibited uses. — Evidence of the following is not admissible on behalf of any party . . . .:

> (2) Conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(Emphasis added.)

opposing party should be allowed the same opportunity in reply. For a long discussion of this relevancy concept on "curative admissibility," *see* 1 Wigmore, Evidence § 15, pp. 731-51 (Tillers Revision 1983). The failure to offer the same opportunity in response to similar circumstances comes close to a deprivation of a trial right protected by due process to "question and challenge adverse evidence." *Id.* at § 7.1, n. 64, p. 505. Although I do not object to the court's decision in this case on the sufficiency of the evidence, I would reverse and remand for a new trial because the trial court rejected important evidence offered by Geisen. Had the jury known that Geisen had been offered the same deal offered to the government's four witnesses, one or more jurors may have believed that Geisen was no more guilty than the witnesses who were spared prosecution and may have believed that his decision was based on a firm belief in his own innocence.

Twice at trial Geisen moved to enter into evidence (1) that the government offered him a deferred prosecution agreement; and (2) that he rejected it. Geisen first moved to introduce this evidence before trial. The trial judge deferred ruling on the motion. During the government's case in chief, the government introduced, over objection, evidence that four of its own witnesses — Miller, Goyal, Moffitt, and Wuokko — had engaged in charging negotiations with prosecutors. Geisen then moved again to have evidence of his own charging negotiations entered, and the court denied the motion. The majority's opinion gives short shrift to the issue and fails to explain the ramifications of the trial judge's decision to permit the jury to learn of the existence of charging negotiations through

government witnesses, while preventing the jury from hearing that Geisen was offered one as well.

The evidence of Geisen's rejection of the government's offer of delayed prosecution raises two evidentiary inferences that should be admissible under the broad definition of "relevant evidence" in Section 401 of the Federal Rules. First is the inference that Geisen argued in his pretrial motion: his rejection of the offer shows "consciousness of innocence" because a jury could fairly infer that an innocent person was more likely to reject this conditional dismissal of all charges than a guilty person. *United States v. Reifsteck*, 841 F.2d 701, 705 (6th Cir. 1988). Dean Wigmore says the evidence should be admissible on this basis alone.[3]

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[3] 3§ 293. Conduct, as evidence of Consciousness of Innocence (Accused's Voluntary Surrender, Refusal to Escape, Demeanor, etc.). If guilt leaves the psychological mark which we term "consciousness of guilt", and if this is available as evidence (*ante*, § 273), then the absence of that mark (which for want of a better term may be spoken of as "consciousness of innocence") is some indication of the absence of guilt, *i.e.*, of not having done the deed charged. No Court seems to repudiate this proposition (*ante*, § 174); but the tendency to reject evidence of a *consciousness of innocence* is rather due to a distrust of the inference from conduct to that consciousness, since the conduct is often feigned and artificial.

Such distrust, however, seems improper. Certainly in the inferences of ordinary life we attach as much weight to that inference as to the inference of consciousness of guilt; the hearing of one accused person as consciously innocent impresses us no less strikingly than the hearing of another as consciously guilty . . . : Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an

The second inference that a jury might make from Geisen's submitted evidence is drawn not from his rejection of the deal, but from the fact that it was offered to him by the government. The offering of the deal raises an inference that Geisen was of no greater culpability than the four witnesses, and hence had not been singled out as more guilty than the others whom the government has let go. Through these witnesses the jury learned that the prosecution divided the employees of the plant into "targets" and "subjects" and that one could change from a target to a subject through a proffer.[4] In the circumstances of

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innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations. With singular perversity, however, several Courts profess to refuse to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence; but one consequence of this is the frequent occurrence of inconsistent rulings by the same Court. 2 Wigmore, Evidence § 293 at 189-90.

[4] For example, during the direct examination of government witness Moffitt, the following exchange took place:

Q: Did you have contact with the prosecutors in this case []?

A. Yes.

Q. What was that contact?

A. Well, I was a target of the investigation, so I certainly had contact from that perspective . . .

Q. What did you understand it meant to be the target of the investigation?

A. Target of investigation meant, like, target of hunting. There was cross-hairs, and I was likely to be indicted for potentially could be indicted on this.

. . .

Q. [W]ere there conditions with respect to the meeting about how things that you told the prosecutors could be used?

A. I think I met at least twice in 2005, if I remember, and there was something called a proffer that was — I signed, either I or my attorney signed.

this case, the problem is not only that the jury was unable to make the second inference, but also that the jury may in fact have been led to infer just the opposite: that, unlike the four witnesses, Geisen was not offered a deal because he was more culpable. The exclusion of Geisen's evidence may have left jurors with the erroneous impression that Geisen was *more* culpable and less entitled to leniency than other employees.

The government proved in its case in chief that other employees had plea bargained their way out of prosecution and that the government's course of conduct with these witnesses was reasonable, but this proof left the jury with the strong impression — absent any other explanation — that Geisen's guilt was in another class. This appearance of more culpability is at least reasonably debatable. What is good for the government's side of the case should also be good for the defendant's side. I know of no basis to make a distinction as to admissibility between acceptance of the government's offer and rejection of the offer. The only reason given by the District Court was that allowing the evidence would delay the trial and cause the parties and the jury to focus on peripheral matters.[5] Principles of

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. . .

Q. And subsequent to that meeting, did the government indicate to you that your status had changed?

A. Yes. Yes.

Q. What was your status at that point?

A. I was a subject of the investigation instead of a target. I certainly felt relieved at that point.

(TT of Moffitt, RE No. 259; ROA pp. 112-114.)

[5] THE COURT: I had said at our pretrial conference that with respect to that motion, I had tentatively reached the conclusion

reciprocity and equal treatment under law, along with normal rules of relevancy, would seem to me more important in any weighing process than the extra time and added complications in the trial that the evidence might cause.

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to deny it. At that time, I indicated that it is my opinion there were far too many factors and variables .... Whatever it may be, it would seem to me that there are more reasons to keep it out than to permit it to come in. And those reasons are that we then open the door to cross examination on what he was told by his counsel; and therefore, what he understood a deferred prosecution agreement to mean for him, and what else was involved in his consideration, including his position for future employment in the nuclear industry and other employment....

There are too many variable like probability or possibility of winning, the length or type of sentence he was facing against the possibility or probability of winning through a not guilty verdict. There are just too many variables other than the explanation which would be permitted to the defendants on closing argument that that represented his denial of guilt. I will not permit it and I will deny the motion. .

(Tr. Pp. 1805-06.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES
OF AMERICA,

Plaintiff, Case No. 3:06 CR 712

-vs-

O R D E R

DAVID GEISEN, et al.,

Defendant.

KATZ, J.

Pending before the Court is Defendant Geisen's motion for judgment of acquittal (Doc. No. 250) or, in the alternative, for a new trial which motion was filed on November 28, 2008. Also before the Court are the government's memorandum in opposition and Defendant's reply thereto. On March 20, 2008, the Court heard oral argument on the motion and the issues are ripe for adjudication.

A. Legal Standards Under Fed. Crim. Rules 29 and 33

In determining whether the evidence upon which the jury based its decision is sufficient to survive a Rule 29 challenge, this Court is directed by the case law to view the evidence and all reasonable

inferences therefrom in a light most favorable to the Government. *United States v. Morrow*, 977 F.2d 222, 230 (6th Cir. 1992). A verdict should be upheld if, ". . . any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virgina*, 443 U. S. 307, 319 (1997); *United States v. Acosta-Casares*, 878 F.2d 945, 952 (6th Cir.), *cert. denied*, 493 U.S. 899 (1989).

The burden under Rule 33 of the Federal Rules of Criminal Procedure is upon the defendant attacking a jury verdict; that verdict is presumptively valid. *United States v. Turner*, 490 F.Supp. 583 (E. D. Mich. 1979). However, the trial court may overturn the jury's verdict where the evidence preponderates heavily against the verdict tantamount to a miscarriage of justice. *United States v. Pierce*, 62 F.3d 818, 825-826 (6th Cir. 1995).

B. Discussion

As noted at the outset of the oral argument, this Court reiterates the issue, under Rule 29, is whether there is sufficient evidence from which a reasonable jury, deliberating with the guidance of proper instructions, could have determined guilt beyond a reasonable doubt, not beyond *all* doubt. Counsel for both sides have been zealous advocates for their clients and the Court lauds their professionalism.

The Court has reviewed the memoranda filed by the parties and reviewed the transcript of the oral argument, giving due consideration to both sides' arguments. Distilled to its essence, the Defendant

argues the government did not present evidence of knowledge of falsity with the intent to deceive. This Court does not agree.

Although a close case, the evidence presented, including testimony from the Defendant himself, when viewed cumulatively, constitutes sufficient direct and circumstantial evidence upon which a reasonable jury, utilizing the standard "beyond a reasonable doubt", could have based a finding of knowledge and intent.

The Defendant's arguments regarding inconsistent verdicts are also unavailing as inconsistent verdicts do not necessarily mandate an acquittal. *United States v. Powell*, 469 U.S. 57 (1984). A comparison of the jury's acquittal of Mr. Cook as contrasted with the Defendant requires the Court to circumvent the jury's determinations regarding credibility and weight of the evidence, an improper role for the reviewing court. *United States v. Evans*, 883 F.2d 496, 501 (6th Cir. 1989).

With respect to the Defendant's motion for new trial under Rule 33, the gravamen of the argument is that the Court erred in giving the "deliberate ignorance" instruction, thus misleading the jury. The pattern instruction, given with some small additional direction to the jury, has been approved in multiple cases cited by the Government at page 32 of its memorandum. The Circuit has repeatedly held that the instruction is harmless error where sufficient evidence of actual knowledge was present. This is the case here. The jury, as in many cases involving state of mind or intent or

knowledge, had before it facts from which it could reasonably conclude that Geisen knowingly included or omitted information or statements which thus misled the NRC. Finally, the Court does not find the verdict is against the manifest weight of the evidence so as to amount to a miscarriage of justice.

This Court has not exhaustively written herein on the issues raised by Defendant and addressed by the Government in approximately 100 typed pages of briefing and two hours of oral argument. It is the conclusion of this Court that the Government's reasoning and conclusions warrant denying Defendant's motion under consideration.

For the foregoing reasons, the Defendant's motion for acquittal pursuant to Rule 29 and for a new trial pursuant to Rule 33 (Doc. No. 250) is DENIED.

IT IS SO ORDERED.

S/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE

APPENDIX C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
	)	Docket No. IA-05-052
DAVID GEISEN	)	

CLI-10-23

MEMORANDUM AND ORDER

On January 4, 2006, the NRC Staff issued an Enforcement Order against David Geisen, charging that he had engaged in deliberate misconduct by contributing to the submission of information to the NRC that he knew was incomplete or inaccurate in some material respect,[1] in violation of 10 C.F.R. §

[1] Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), IA-05-052 (Jan. 4, 2006) (ADAMS

50.5(a)(2).[2] At the time of the asserted misconduct, Mr. Geisen was employed at the Davis-Besse Nuclear Power Station (Davis-Besse), a facility operated by FirstEnergy Nuclear Operating Company (FENOC). The Enforcement Order barred Mr. Geisen, effective immediately, from involvement in all NRC-licensed activities for five years. Mr. Geisen challenged the Enforcement Order before the Licensing Board. During the prehearing portion of this adjudication, Mr. Geisen and the Staff stipulated to the falsity of certain statements made by FENOC and Mr. Geisen. But Mr. Geisen maintained throughout the adjudication – and still maintains – that he did not know at the time he made those statements that they were false.

The Board conducted an evidentiary hearing, and a majority of the Board issued the Initial Decision that is before us today on appeal.[3] In that

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accession number ML053560094), 71 Fed. Reg. 2571 (Jan. 17, 2006) (Enforcement Order). The Order identified six instances where, according to the Staff, Mr. Geisen had deliberately provided such information: Serial Letters 2731 (Sept. 4, 2001), 2735 (Oct. 17, 2001) and 2744 (Oct. 30, 2001); an October 3, 2001 teleconference; an October 11, 2001 briefing to the Commissioners' technical assistants; and a November 9, 2001 meeting of the NRC's Advisory Committee on Reactor Safeguards.

[2] Section 50.5 provides, in relevant part, that "[a]ny . . . employee of a licensee . . . may not . . . [d]eliberately submit to the NRC [or] a licensee . . . information that [employee] *knows* to be incomplete or inaccurate in some respect material to the NRC." 10 C.F.R. § 50.5(a)(2) (emphasis added). The Staff further found that Mr. Geisen's actions had placed the licensee in violation of 10 C.F.R. § 50.9. Enforcement Order at 14.

[3] LBP-09-24, 70 NRC __ (Aug. 28, 2009) (slip op.). Administrative Judges Farrar and Trikouros formed the majority. Chief Administrative Judge Hawkens dissented from this ruling. Judge Farrar subsequently provided additional

decision, the majority set aside the Enforcement Order on the ground that the Staff had not demonstrated by a preponderance of the evidence that Mr. Geisen had committed the asserted knowing misrepresentations. Based on the evidence presented, the majority also prohibited the Staff from using the portion of the Order barring Mr. Geisen from returning to employment in the regulated nuclear industry after his employment ban is lifted or expires.[4]

The Staff has filed a petition for review of LBP-09-24,[5] pursuant to 10 C.F.R. § 2.341(b)(2) and (4). The Staff asserts that the Initial Decision "contained legal conclusions that were contrary to or without established precedent; raised substantial questions of law, policy, and discretion; involved prejudicial procedural errors; and reflected findings of material fact that were clearly erroneous."[6] Based on these assertions, the Staff asks that we grant its petition, reverse LBP-09-24, and reinstate Mr. Geisen's five-year employment ban.[7] Mr. Geisen opposes the Staff's petition for review.[8] We grant the Staff's petition and affirm LBP-09-24.

views. See Memorandum (Additional Views of Judge Farrar), 70 NRC __ (Dec. 11, 2009) (slip op.).

[4] *Id.* at __ (slip op. at 144). *See also id.* at __ (slip op. at 122).

[5] *See NRC Staff's Petition for Review of LBP-09-24* (Sept. 21, 2009) at 1 n.2 (Staff Petition).

[6] *Id.* at 2-3 (tracking the criteria set forth in 10 C.F.R. § 2.341(b)(4)(i)-(iv)).

[7] *Id.* at 3.

[8] David Geisen's Answer Opposing the NRC Staff's Petition for Commission Review of the Board's Initial Decision Regarding the Enforcement Order Against Him (Oct. 13, 2009) (Geisen Answer).

To put this decision in context, the violations surrounding Davis-Besse resulted in a variety of agency activities, including actions taken against FENOC which resulted in its shutdown for several years and issuance of a $5.45 million fine, the largest fine to date in the agency's history. Moreover, both the NRC and the United States Department of Justice (DOJ) pursued actions against the company and several individuals, most of which resulted in penalties being upheld. This ruling is based upon the specific facts and circumstances of the Board's ruling in LBP-09-24 and should only be viewed in that context.

I. BACKGROUND

The majority decision provides a detailed and useful synopsis of the case's technical background and relevant technical documents.[9] It also includes a detailed summary of the factual and procedural background, together with an explanation of the interrelationship between this proceeding and the parallel criminal case against Mr. Geisen in federal court.[10] Given the Board's thorough discussion, we find it unnecessary to set out here more than a brief sketch of the factual, technical, and legal background of this case.

In 2001, the Commission issued various generic communications to its reactor licensees regarding a newly discovered risk of circumferential cracking of nozzles penetrating the reactor vessel head, including the control rod drive mechanism (CRDM) nozzles and thermocouple nozzles. One of

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[9] LBP-09-24, 70 NRC ___ (slip op. at 9-19).

[10] *Id.* at __ (slip op. at 4-8).

these communications was Bulletin 2001-01,[11] where the NRC staff required every pressurized water reactor licensee (including FENOC) to "provide information related to the structural integrity of the reactor pressure vessel head penetration . . . nozzles for their respective facilities."[12] The Bulletin explained that reactor coolant leaking through the tight cracks in the nozzles could cause deposits of boron to accumulate on the reactor head.[13] The Bulletin was, by its nature, a vehicle to gather information, not an enforcement tool.[14]

During a five-week period between October 3 and November 9, 2001, FENOC was repeatedly in touch with the NRC regarding FENOC's responses to the Bulletin.[15] At the time of these communications, FENOC's management was concerned particularly that the Commission would shut down the Davis-Besse plant in December 2001, a few months prior to its scheduled March 2002 refueling outage (RFO 13).[16] After FENOC

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[11] Staff Ex. 8, NRC Bulletin 2001-01: *Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles* (Aug. 3, 2001) (Bulletin) (Staff Exhibits – Volume 1, Exhibits 1-20 (Part 1) are available at ML093100167) (Staff Exhibits, Part 1, at 89).

[12] *Id.* at 1.

[13] *Id.* at 4-5.

[14] *See id.* at 1, 10-13; Notice of Issuance, Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles; Issue, 66 Fed. Reg. 41,631 (Aug. 8, 2001).

[15] *See* LBP-09-24, 70 NRC __ (slip op. at 17, Table 1) (listing the six communications referenced in note 1, *supra*).

[16] The Staff had "strongly suggest[ed] that Davis-Besse . . . consider shutting down by the end of the year [2001] and perform an inspection of the reactor head vessel CRD nozzles." Staff Ex. 46, E-mail from Dale L. Miller (FENOC) to George.Rombold@exeloncorp.com, *et al.* (Sept. 28, 2001) (Staff

submitted information and commitments in addition to its response to Bulletin 2001-01, the NRC staff permitted Davis-Besse's continued operation until February 16, 2002.[17]

A visual inspection in March 2002, during the refueling outage, revealed a serious corrosion cavity in Davis-Besse's reactor vessel head, resulting from boric acid leakage.[18] In response to the discovery of the corrosion cavity, the NRC staff initiated an investigation. Upon its completion in 2003, the NRC's Office of Investigations reported, among other things, that some of FENOC's responses to the NRC's communications during 2001 were materially incorrect and therefore violated 10 C.F.R. § 50.9(a).[19]

Exhibits – Volume 1, Exhibits 21-70 (Part 2) are available in ML093100169) (Staff Exhibits, Part 2, at 130). Internal corporate memoranda indicate that FENOC's management was concerned that such an early shutdown (three months earlier than the next planned refueling outage for Davis-Besse) would impose "direct costs" and "replacement power costs" upon the licensee, as well as increase the personnel dosage and generate additional radwaste. Staff Ex. 47, Discussion Agenda: DBNPS Bulletin 2001-01 Response, at unnumbered p. 2 (Oct. 2, 2001) (available in Staff Exhibits, Part 2, at 131).

[17] *See* Memorandum from William D. Travers, Executive Director for Operations, to the Commissioners, entitled "Status of FirstEnergy Nuclear Operating Company Response to Nuclear Regulatory Commission (NRC) Bulletin 2001-01, 'Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles'" (Dec. 6, 2001) (ML022700362).

[18] Enforcement Order at 2-3.

[19] Geisen Ex. 23, OI Report No. 3-2002-006 (Aug. 22, 2003) (selected portions) (ML092740337) (date illegible on, or missing from, Ex. 23, but specified in Tr. at 2169 (Dec. 12, 2008)). Section 50.9(a) requires that information provided to the Commission as required by statute, or by the Commission's regulations, orders, or license conditions "be complete and accurate in all material respects."

And on January 4, 2006, the NRC issued the Enforcement Order against Mr. Geisen, charging that he had "engaged in deliberate misconduct by deliberately providing FENOC and the NRC information that he knew was not complete or accurate in all material respects to the NRC, a violation of 10 CFR 50.5(a)(2)."[20] The Enforcement Order barred Mr. Geisen from working in the regulated nuclear industry for five years, until January 4, 2011.

While the NRC staff was proceeding with investigation and enforcement activities, DOJ initiated a criminal proceeding against Mr. Geisen in the United States District Court for the Northern District of Ohio. DOJ obtained a grand jury indictment against Mr. Geisen in January 2006, based on many of the same facts upon which the NRC staff relied in the Enforcement Order.[21]

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[20] Enforcement Order at 14. The NRC simultaneously issued enforcement orders against two other FENOC employees who, like Mr. Geisen, had been involved in the cavity corrosion problem at Davis-Besse. *See Dale Miller*, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006), 71 Fed. Reg. 2579 (Jan. 17, 2006); *Steven Moffitt*, Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately) (Jan. 4, 2006), 71 Fed. Reg. 2581 (Jan. 17, 2006). Earlier, the NRC had issued a fourth enforcement order concerning the same matter. *See Andrew Siemaszko*, Order Prohibiting Involvement in NRC-Licensed Activities (Apr. 21, 2005), 70 Fed. Reg. 22,719 (May 2, 2005).

[21] Indictment, *United States v. Geisen*, No. 3:06CR712 (N.D. Ohio Jan. 19, 2006) (appended as Attachment A to *NRC Staff Motion to Hold the Proceeding in Abeyance* (Mar. 20, 2006)) (Indictment). The indictment charged Mr. Geisen with five counts of knowingly and willfully concealing and covering up material facts, regarding the condition of Davis-Besse's reactor vessel head and the nature and findings of previous inspections of the reactor vessel head, with respect to: (Count 1) documents

Mr. Geisen challenged both the criminal charges and the Enforcement Order. Before the Commission, he sought a hearing, which was granted but later held in abeyance pending completion of the criminal trial.[22] The criminal case resulted in a conviction on three counts, including one based on a document (Serial Letter 2744) upon which the NRC staff also had relied in its Enforcement Order.[23] In May 2008, the trial judge sentenced Mr. Geisen to three years probation (that is, through May 2011), during which time he is prohibited from working in the nuclear power industry.[24] Mr. Geisen's criminal conviction was recently upheld on appeal.[25]

Shortly after the sentencing, Mr. Geisen moved to lift the Commission's abeyance order. The Board agreed and conducted an expedited

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and communications occurring between September 4, 2001, and February 16, 2002, generally; (Count 2) Serial Letter 2735 (Oct. 17, 2001), specifically (Count 3) Serial Letter 2741 (Oct. 30, 2001), specifically; (Count 4) Serial Letter 2744 (Oct. 30, 2001), specifically; and (Count 5) Serial Letter 2745 (Nov. 1, 2001), specifically.

[22] CLI-07-6, 65 NRC 112 (2007).

[23] LBP-09-24, 70 NRC __ (slip op. at 7 n.3).

[24] Following issuance of LBP-09-24, the district court lifted the condition of Mr. Geisen's probation banning him from employment in the nuclear industry. *See United States v. Geisen*, No. 3:06-CR-712, 2009 WL 4724265, at *1 (N.D. Ohio Dec. 2, 2009). *See also United States v. Geisen*, No. 3:06-CR-712, Transcript of Sentencing Hearing Before the Honorable David A. Katz, United States District Judge (May 1, 2008) (appended as Ex. C to Letter from Richard A. Hibey to the Licensing Board (June 24, 2008) (ML081910153)); Notice and Order (regarding Conference Call) (July 17, 2008) at 3 (unpublished).

[25] *United States v. Geisen*, No. 08-3655, 2010 WL 2774237 (6th Cir. July 15, 2010).

hearing.[26]The Staff relied principally on the following evidence: (i) the six communications themselves;[27] (ii) four "trip reports" describing business trips taken by Mr. Prasoon Goyal, one of Mr. Geisen's subordinates, associated with the 2001 announcement that the Oconee Nuclear Station had experienced boron leakage;[28] (iii) two condition reports and a photograph that Mr. Geisen would have seen during the 2000 refueling outage (RFO 12); (iv) a June 27, 2001 memorandum prepared by Mr. Goyal, reviewed by Mr. Goyal's supervisor (Mr. Theo Swim) and approved by Mr. Geisen; and (v) certain of Mr. Goyal's e-mail correspondence, of which Mr. Geisen was a direct or copied recipient.[29]

Following the hearing, the majority ruled in favor of Mr. Geisen, finding that the Staff had failed to show by a preponderance of the evidence that Mr. Geisen had *knowingly* (rather than mistakenly) provided the agency incomplete and inaccurate information. Much of the majority's decision turned upon its findings both as to Mr. Geisen's state of mind at the time of the erroneous, incomplete or misleading statements, and as to his involvement in and contribution to those statements.[30] The majority declined the Staff's invitation to use Mr. Geisen's criminal conviction to "collaterally estop" him from maintaining that he lacked the requisite "knowing" state of mind.

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[26] Memorandum and Order (Summarizing Conference Call) (Nov. 3, 2008) (unpublished). The hearing was held December 8-12, 2008.

[27] *See* LBP-09-24, 70 NRC __ (slip op. at 17, Table 1).

[28] *See id.* at __ (slip op. at 18, Table 2).

[29] *See id.* at __ (slip op. at 19, Table 3).

[30] *Id.* at __ (slip op. at 20-21).

Judge Hawkens dissented from the majority's rulings.[31] He concluded that because of Mr. Geisen's criminal conviction, the NRC was required under the collateral estoppel doctrine to find that Mr. Geisen had knowingly provided the agency with materially incomplete and inaccurate information.[32] He also found that, regardless of whether collateral estoppel was applied, the Staff had demonstrated by a preponderance of the evidence that Mr. Geisen had the requisite knowledge that his statements were incomplete, misleading, and/or inaccurate.[33]

II. DISCUSSION

A. Standards Governing Petitions for Review

We may take discretionary review of a licensing board's initial decision.[34] In deciding whether to grant review, we give due weight to the existence of a substantial question with respect to the following considerations:

> (i) a finding of fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
>
> (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

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[31] *Id.* at ___ (slip op., Dissenting Opinion).

[32] *Id.* at ___ (slip op., Dissenting Opinion at 2-21).

[33] *Id.* at ___ (slip op., Dissenting Opinion at 21-61). Judge Hawkens also considered the fiveyear suspension reasonable, given the gravity of, and circumstances surrounding, Mr. Geisen's asserted offense. *Id.* at __ (slip op., Dissenting Opinion at 62-65).

[34] 10 C.F.R. § 2.341(b)(4).

(iii) the appeal raises a substantial and important question of law, policy, or discretion;

(iv) the conduct of the proceeding involved a prejudicial procedural error; or

(v) any other consideration we determine to be in the public interest.[35]

The Staff asserts that the Board made not only erroneous factual findings but also mistakes as to both substantive and procedural law. As discussed below, we agree that the Staff raises substantial questions as to factors (i), (ii), (iii), and (iv). We therefore grant the Staff's petition for review. But after considering the Staff's arguments, we uphold the decision of the Board majority to overturn the Enforcement Order. While we find the factual questions close, as an appellate tribunal, our fact-finding capacity and role are limited to a record review, and our review of the record does not show that the majority's findings of fact are clearly erroneous. We also agree with the Board majority's key legal rulings, including its refusal to apply collateral estoppel.

Given that the issues in this case, factual and legal, have been sharply contested, and in view of the vigorous and thoughtful disagreement among the members of the Board, we explain our view of the case in some detail.

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[35] *Id.*

B. Analysis

1. Threshold Legal Issue: The Board's Assessment of Mr. Geisen's State of Mind

The majority offered a summary description of its approach to determining Mr. Geisen's state of mind. Because his state of mind is a critical issue in this proceeding and this appeal, we set forth the summary as follows:

> Fundamental to our decision today is the concept that . . . "knowledge" does not necessarily follow simply from previous exposure to individual facts. Instead, to have knowledge, an individual must have a current appreciation of those facts and of what those facts mean in the circumstances presented.
>
> In the circumstance of this case, it is not just the absorption of the key facts that is in issue. Beyond knowing the existence of those facts, to be found liable for a knowing misrepresentation Mr. Geisen had to know of their significance. Crucial in this respect was that Mr. Geisen knew the Davis-Besse plant had always had a problem with leaking flanges, and had a general understanding that inspections were made more difficult – but not, in his mind, impossible – by the geometry of the head and its access ports. He also, for entirely valid and understandable reasons, believed – mistakenly, along

with many others – that the reactor vessel head had been cleaned after the inspection in 2000, and this influenced some of what he represented to the NRC.

In sum, Mr. Geisen filtered incoming facts against this always limited, and sometimes mistaken, knowledge base, and was slow to recognize that the new facts that he did absorb heralded a new era of problems. But without such recognition, he did not attain the degree of "knowledge" sufficient to establish guilty misrepresentation – rather than innocent mistakenness fueled by disinformation coming from his co-workers and elsewhere within the company.

Thus, the question before us is not whether Mr. Geisen could have done a better job or should have known that – or should have taken steps to determine whether – the information being provided to the NRC was inaccurate or incorrect. Rather, the question was whether the Staff has proven that he had actual knowledge, at the time the submissions were made, that the information being provided was false and that he deliberately acted contrary to that knowledge.[36]

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[36] LBP-09-24, 70 NRC ___ (slip op. at 21-22) (emphasis omitted).

The Staff construes the majority's approach as establishing a "knowledge hierarchy" for determining a person's state of mind.[37] Pointing to various passages in the Board decision, the Staff also concludes that the Board has created a new "Five-Factor Test":

- The wrongdoer must be an expert in the particular matter at issue;[38]
- The wrongdoer must not be busy with other important matters during any relevant time period;[39]
- The matter at issue must be within the wrongdoer's job description and permanently assigned duties;[40]
- The wrongdoer must not only read written communications concerning the matter at issue, but must also act upon or otherwise respond positively to the communication in a way that conforms to the majority's "Knowledge Hierarchy";[41] and
- The wrongdoer must have knowledge of not only the content of any relevant

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[37] Staff Petition at 4-9.

[38] *Id.* at 4 (citing LBP-09-24, 70 NRC __ (slip op. at 25, 60, 86, 126, 133)).

[39] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 24, 57, 75, 88, 95, 96 n.147, 139 n.172, 141)).

[40] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 12-13, 24, 60, 70, 88)).

[41] *Id.* at 5 (citing LBP-09-24, 70 NRC __ (slip op. at 31-33)).

document, but also its context and implications.[42]

The Staff asserts that this "new paradigm"[43] is far more difficult to satisfy than the "preponderance of the evidence" standard established under the Administrative Procedure Act.[44] Indeed, the Staff claims that this new standard "renders it nearly impossible to establish that an individual acted deliberately," and thereby would erode substantially the NRC's enforcement program.[45] According to the Staff, "even an admission of actual knowledge and deliberate action might not be enough to meet the 10 C.F.R. § 50.5 deliberate misconduct requirements [as construed by the majority] if, for example, evidence showed the individual was busy with other important job matters or the pertinent matter was not within his job description."[46] Moreover, the Staff argues, this new standard would undermine the enforcement program's deterrent effect on people who otherwise might submit incomplete and/or inaccurate information to the NRC.[47]

The Staff's entire line of argument raises the key issue on which the majority and Chief Judge Hawkens differed: What constitutes "knowledge" for

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[42] *Id.* (citing LBP-09-24, 70 NRC __ (slip op. at 21, 32, 58, 64-65, 112)).

[43] *Id.*

[44] *Id.* at 4 (citing Final Rule, Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,673 (Aug. 15, 1991)).

[45] *Id.* at 5.

[46] *Id.*

[47] *Id.* at 5-6 (citing Staff Ex. 1, NRC Enforcement Policy, at 4 (available in Staff Exhibits, Part 1, at 2, 6)).

purposes of 10 C.F.R. § 50.5(a)(2)?[48] Because determinations of "knowledge" are factual by their very nature, the factors pertinent to such determinations in one proceeding are dictated largely by the facts and context of that case, and may be inappropriate in another proceeding. For this reason, we cannot accept the Staff's argument that the majority set forth a new "knowledge" test that would have precedential value in future enforcement adjudications.[49] Rather, we interpret the majority's statements simply as a detailed explanation of its reasoning in arriving at its state-of-mind findings in this particular case.

Moreover, because the facts of every enforcement case are unique, the method of a board's fact-finding likewise will have to be somewhat different in each proceeding, just as the Staff's own fact-finding and sanctions determinations are handled on a case-by-case basis.[50] The Staff's argument regarding a "new legal standard" disregards this reality and leads to the illogical

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[48] Section 50.5(a)(2) prohibits a person from contributing to the submission of information to the NRC that he knows was incomplete or inaccurate in some material respect. As Judge Hawkens succinctly put it in his Dissenting Opinion, "[t]he sole issue here – as in his criminal trial – is whether he knew the information was materially incomplete and inaccurate at the time it was submitted to the NRC." LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 24 n.15).

[49] Board decisions carry no precedential weight, so even were the majority seeking to establish such a test here, the test would not be controlling in other proceedings. *See, e.g., Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 263 n.40 (2008); *Aharon Ben-Haim*, CLI-99-14, 49 NRC 361, 364 (1999).

[50] *See* Tr. at 2014-15, 2021, 2038 (Staff witness Kenneth G. O'Brien).

conclusion that any board adjudicating an enforcement case necessarily establishes a new set of legal standards.[51]

Further, we agree with the majority that, for purposes of section 50.5, "knowledge" of a fact requires not only an awareness of that fact but also an understanding or recognition of its significance. We find support for this conclusion in analogous areas of both civil and criminal law. For instance, the Sixth Circuit offered the following description of the criminal law prohibiting fraudulent statements under 18 U.S.C. § 1001(a)(2) (barring "materially false, fictitious, or fraudulent statement[s] or representation[s]" in matters within the federal government's jurisdiction):

> [A] false statement charge under § 1001, like a perjury charge, effectively demands an inquiry into the Defendant's state of mind and his intent to deceive at the time the testimony was given, and the entire focus of a perjury inquiry centers upon what the testifier knew and when he knew it, in order to establish[] beyond a reasonable doubt that he knew his testimony to be false when he gave it.[52]

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[51] Staff Petition at 6. *See also id.* at 5 ("new [legal] paradigm").

[52] *United States v. Ahmed*, 472 F.3d 427, 433 (6th Cir. 2006) (internal quotation marks and citation omitted, second alteration in original), *cert. denied*, 551 U.S. 1132 (2007). *See also United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006) ("Willfulness . . . means nothing more in this context than that the *defendant knew that his statement was false when he made it* or . . . consciously disregarded or averted his eyes from its likely falsity." (emphasis added; citation omitted)); *United States v. Curran*, 20 F.3d 560, 567 (3d Cir. 1994) ("To convict a

Similarly, concerning the more general subject of criminal guilt, the Supreme Court has observed that the words "'knowledge' and 'knowingly' are normally associated with awareness, understanding, or consciousness."[53] Along the same lines, the Second Circuit has held that knowledge may suffice for criminal culpability "if extensive enough to attribute to the knower a 'guilty mind,' or knowledge that he or she is performing a wrongful act."[54] Likewise, courts have held that the civil law concept of "assumption of risk" requires not merely general knowledge of a risk but also "that the risk assumed be specifically known, understood and appreciated."[55]

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person accused of making a false statement, the government must prove not only that the statement was false, but that the *accused knew it to be false*." (emphasis added)).

Some circumstances surrounding a person's false statement may be "so obvious that knowledge of its character fairly may be attributed to him." *United States v. Figueroa*, 720 F.2d 1239, 1246 (11th Cir. 1983). *See, e.g., United States v. Picciandra*, 788 F.2d 39, 46 (1st Cir.) ("Any reasonable person would have realized that in today's society the bizarre bearing of shopping bags filled with large sums of cash signaled some form of illegal activity"), *cert. denied*, 479 U.S. 847 (1986). *See also United States v. Burgos*, 94 F.3d 849, 869 (4th Cir. 1996); *Williams v. United States*, 379 F.2d 719, 723 (5th Cir. 1967) (concerning contributory negligence where the risks are "patently obvious"). But, as the split Board decision shows, this proceeding does not present so "obvious" a situation.

[53] Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005).

[54] *United States v. Figueroa*, 165 F.3d 111, 115-16 (2d Cir. 1998).

[55] *Lambert v. Will Bros. Co.*, 596 F.2d 799, 802 (8th Cir. 1979) (Arkansas law). *Accord Bonds v. Snapper Power Equip. Co.*, 935 F.2d 985, 988 (8th Cir. 1991) (same); *Kennedy v. U.S.*

The Staff further complains that "the Majority applied its new standards for proving knowledge after the close of the record, without notice, without providing the Staff an opportunity to present evidence focusing on these standards, and then relied heavily on these standards in rendering its decision."[56] The Staff points to federal case law for the proposition that, "'when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obliged to give litigants proper notice and a meaningful opportunity to adjust.'"[57] But, as we explained above, the Board majority applied no "new legal standard" here. Rather, it merely examined the particular facts of this case (and their full context) thoroughly. Indeed, had the majority not explained how it had arrived at its findings of fact, it would have failed to comply with its responsibilities under the Administrative Procedure Act to issue a "reasoned decision."[58]

Last, the Staff asserts that even if the new "Five-Factor Test" is appropriate, the majority nonetheless applied it inconsistently by "failing to

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Constr. Co., 545 F.2d 81, 84 n.1 (8th Cir. 1976) (same); *Sun Oil Co. v. Pierce*, 224 F.2d 580, 585 (5th Cir. 1955) (Texas law).

[56] Staff Petition at 6.

[57] *Id.* (quoting *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), and citing *Alabama v. Shalala*, 124 F. Supp. 2d 1250, 1263-64 (M.D. Ala. 2000)).

[58] *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decisionmaking.'"). *See generally Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000) (referring to a petitioner's right to a "reasoned adjudicatory decision").

properly consider" the Staff's evidence.[59] Although couched in legal terms, this argument is at bottom a factual challenge to the way the majority weighed and balanced the conflicting evidence in this proceeding. We consider and reject each of the Staff's specific factual challenges below. We add only that the majority's decision to give greater weight to Mr. Geisen's evidence does not mean that the majority improperly failed to consider the Staff's evidence. Indeed, the majority cited and addressed the Staff's exhibits and testimony repeatedly throughout the fact-finding section of LBP-09-24.[60]

2. Factual Challenges

a. The Burden to Show "Clear Error"

The Staff claims that four significant findings of fact made by the majority were "clearly erroneous." To show clear error, the Staff must demonstrate that the majority's findings are "not even plausible in light of the record viewed in its entirety."[61] This is a difficult standard to meet. The Staff's brief did not cite an example – nor have we found one – where the Commission has overturned a Board finding of fact due to "clear error."

In each instance, the record does contain some evidence that supports the Staff's point of view. Indeed, we have no doubt that based on the record,

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[59] Staff Petition at 6. *See generally id.* at 6-9.

[60] *See* LBP-09-24, 70 NRC __ (slip op. at 54-119), which includes over 100 citations to or quotations from Staff exhibits, and still more citations to Staff witnesses' testimony, Staff pleadings and the Enforcement Order.

[61] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 189 (2004) (internal quotation marks omitted) (*quoting Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995) (in turn quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985))).

the Board permissibly could have inferred that Mr. Geisen knowingly misled the NRC, and that the outcome of this proceeding plausibly could have been different. But this is not a reason to reverse the majority.[62] In as hard-fought a case as this, we would not expect the record to support one party only. The fact that the majority accorded greater weight to one party's evidence than to the other's is not a basis for overturning the initial decision.

The Board had before it the totality of the evidence – including the testimony from a five-day hearing, hundreds of pages of documentary evidence, and transcripts from investigative interviews and a criminal trial. We will not lightly overturn the majority's ruling, particularly where much of that evidence is subject to interpretation.[63] In addition, findings of fact that turn – as they do here – on witness credibility receive our highest deference.[64] A

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[62] *See generally Pierce*, CLI-95-6, 41 NRC at 382 ("The Staff's petition . . . demonstrates only that the record evidence in this case may be understood to support a view sharply different from that of the Board . . . . [but] does not show that the Board's own view of the evidence was 'clearly erroneous.'").

[63] For example, the Staff cites a portion of Mr. Geisen's testimony to show that Mr. Geisen understood the requirements of Bulletin 2001-01. *See* Staff Petition at 21 (citing Tr. at 1820, 1823-28). It is unclear from the exchange at the evidentiary hearing, however, whether Mr. Geisen was testifying as to what he understood in the Fall of 2001 or what he understood during the hearing while reading that same Bulletin. *See* discussion at text associated with notes 106-107, *infra*.

[64] *See Watts Bar*, CLI-04-24, 60 NRC at 189 ("Our deference is particularly great where 'the Board bases its findings of fact in significant part on the credibility of the witnesses.'" (quoting *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003))). *See also PFS*, CLI-03-8, 58 NRC at 27, 29, 36; *Carolina Power & Light Co.*

board's findings regarding a particular witness's knowledge or state of mind depend, as a general rule, largely on that witness's credibility.[65] In this matter, the majority relied extensively on Mr. Geisen's demeanor and credibility as a witness.[66]

This enforcement action turns on Mr. Geisen's state of mind: whether he knew that the information presented to the NRC in response to Bulletin 2001-01 was false. The parties stipulated that certain material information Mr. Geisen provided to the NRC during two presentations to the NRC, a conference call, and in three serial letters described in the Enforcement Order was false.[67] Although the investigation into this matter included interviews with over thirty Davis-Besse employees, the majority found that there was no direct evidence – for

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(Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386 & n.6 (2001), *petition for review denied*, *Orange County v. NRC*, 47 Fed. Appx. 1, 2002 WL 31098379 (D.C. Cir. 2002); *Ben-Haim*, CLI-99-14, 49 NRC at 364 & n.2.

[65] *Cf. Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-85-30, 22 NRC 332, 396 (1985) ("The Board concludes that Mr. Herbein's testimony that he did not know about the early high incore temperature readings is . . . not credible, in light of his two earlier statements"); *Inquiry into Three Mile Island Unit 2 Leak Rate Data Falsification*, LBP-87-15, 25 NRC 671, 783 (Recommended Decision 1987) ("While we would not expect the [control room operators] to recall details of such discussions, we find not credible their professed inability to remember anything about the knowledge of their fellow [control room operators], particularly in light of the very striking pattern of their joint involvement in manipulation that emerges from the records analysis.").

[66] *See, e.g.*, LBP-09-24, 70 NRC __ (slip op. at 21, 24, 76, 83 n.133, 85 n.138, 116, 133 n.169).

[67] *See NRC Staff Hearing Submissions*, Attachment 2 (Stipulated Facts) (Dec. 3, 2008). *See generally* Enforcement Order.

example, witness testimony – presented to demonstrate that Mr. Geisen knew more than he asserted that he did.[68]

Instead, the success of Staff's case depended upon whether the Staff could convince the Board that knowledge permissibly could be inferred through circumstantial evidence. First, the Staff demonstrated that Mr. Geisen had admitted that he was aware of certain facts concerning the condition of the reactor vessel head. Second, the Staff demonstrated that Mr. Geisen had been on the recipient list of documents and e-mails that discussed the reactor head and inspections, so that the Board could infer that Mr. Geisen "knew" the information contained in those documents. Ultimately, the Board's decision came down to weighing Mr. Geisen's testimony that he did not realize the information provided to the NRC was false (as well as circumstances making Mr. Geisen's version plausible), against the Staff's circumstantial evidence that he must have recognized its falsity when he presented it or concurred in its submission. The Board majority believed Mr. Geisen; Judge Hawkens did not.

The majority largely accepted Mr. Geisen's explanations of why he did not appreciate that the information provided to the NRC was false when he concurred in its presentation – either because he had relied on other people to verify the accuracy of certain information;[69] because he had focused only

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[68] *See* LBP-09-24, 70 NRC __ (slip op. at 27-28).

[69] For example, Mr. Geisen apparently relied on Andrew Siemaszko, who had performed the 2000 inspection and cleaning and who was assigned the task of determining which nozzles could be seen on the videotapes from past inspections,

on his own area of responsibility in verifying the technical accuracy of the correspondence sent to NRC;[70] or because he had focused his attention on responding to the Bulletin's request for information regarding future rather than past inspections.[71] We observe that none of these circumstances necessarily "proves" that Mr. Geisen did not know that the information was false. But the majority found Mr. Geisen credible on this point, leading to its ultimate fact finding that Mr. Geisen did not know at the time that his representations were false or misleading.

Although recognizing our highly deferential standard of review for Board findings of fact, the Staff argues that the majority's findings with respect to these circumstances are so contrary to the weight of the evidence as to amount to mere rationalizations. The Staff directs our attention to a number of instances where the record supported findings different from those of the majority, or where the Staff claims the majority's findings lack record support. We consider each of these in turn below.

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and also on Prasoon Goyal, senior mechanical engineer for Design Basis Engineering. *See id.* at __ (slip op. at 87). *See also id.* at __ (slip op. at 104 (citing Tr. at 1725) ("[T]here is no evidence that anyone else on the FENOC team conveyed to Mr. Geisen during the course of preparing slides and planning the presentation that the information was incorrect.")).

[70] *See id.* at __ (slip op. at 58-59 (citing Tr. at 1640)).

[71] *See id.* at __ (slip op. at 85 (citing Tr. at 1826-27)).

b. Specific Claims of Error

(1) WHETHER MR. GEISEN KNEW THE BULLETIN'S REQUIREMENTS AND INSPECTION LIMITATIONS

The Staff challenges the majority's finding that Mr. Geisen did not know that two important factors prevented 100% visual inspections of the reactor vessel head at Davis-Besse during the prior three refueling outages.[72] The majority accepted Mr. Geisen's testimony that (1) he did not realize that the inspection method Davis-Besse had used in the past precluded viewing the topmost nozzles on the reactor vessel head, and (2) he did not know boron deposits on the reactor head also interfered with the inspections.[73]

The Board's findings of fact on the inspection limitations go to the heart of this enforcement action. To persuade the NRC not to shut down the reactor prior to its next scheduled refueling outage, management at Davis-Besse sought to show that, at their plant, there was no danger posed by the circumferential nozzle cracking seen at other plants. To that end, FENOC sought in its responses to Bulletin 2001-01 to show that the CRDM nozzles had shown no sign of cracking in prior inspections.

It is undisputed that it was impossible to view each and every nozzle that penetrated the reactor head during the inspections done during certain refueling outages.[74] At the time, Davis-Besse's employees conducted these inspections by inserting a

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[72] Staff Petition at 19-21.

[73] LBP-09-24, 70 NRC __ (slip op. at 79-80, 83, 86-87).

[74] *See* Stipulated Facts at 4, 7 (referring specifically to Refueling Outages 10 (1996) (RFO 10), 11 (1998) (RFO 11), and 12 (2000) (RFO 12)).

camera mounted on a rigid pole through "mouseholes" or "weep holes"[75] in the reactor service structure, in order to view the reactor head and penetrating nozzles ("camera-on-a-stick" method).[76] These inspections frequently were videotaped.[77] The curvature of the head, however, made it impossible to view the topmost nozzles when using the camera-on-a-stick method,[78] which was the method used during RFO 10, in 1996; RFO 11, in 1998; and RFO 12, in 2000.[79] In addition, boron deposits accumulating over the years further blocked the camera from capturing all or parts of the nozzles (although the head ostensibly was cleaned through either mechanical means or with water after each inspection).[80]

FENOC took several steps to overcome these inspection limitations. There had been a request, pending since 1994, to cut additional access holes in the reactor service structure in order to better maneuver the camera, although this plan was never carried out.[81] Ultimately, FENOC purchased for use in the 2002 inspection a camera mounted on a robotic rover that would be able to "crawl" over the

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[75] "Mouseholes" are 5" x 7" cutouts in the service structure that provide access to both the outside of the reactor vessel head and to the area between the head and the insulation. LBP-09-24, 70 NRC __ (slip op. at 10).

[76] *Id.* at __ (slip op. at 12).

[77] *Id.* at __ (slip op. at 11).

[78] Tr. at 854-55, 901 (Staff witness Melvin Holmberg).

[79] LBP-09-24, 70 NRC __ (slip op. at 11-12). *See also* Tr. at 866-67 (Staff witness Melvin Holmberg).

[80] *See* LBP-09-24, 70 NRC __ (slip op. at 60; 62-63); Tr. at 901, 1565.

[81] *See id.* at __ (slip op. at 30).

rounded head to see the topmost nozzles.[82] In addition, because mechanical methods to remove boron deposits had not been successful after RFO 10 and RFO 11, a work order was issued to use demineralized water to clean the head after RFO12 in 2000.[83]

FENOC's first response to the NRC's 2001 Bulletin seeking information on vessel head integrity was Serial Letter 2731, dated September 4, 2001, where FENOC stated that the 1998 and 2000 inspections showed flange leakage but no nozzle leakage.[84] On October 11, 2001, various managers from FENOC, including Mr. Geisen, met with the Commissioners' technical assistants to present the company's argument that the reactor could safely operate until scheduled RFO 13, in March 2002. Slides presented at this meeting indicated that inspection tapes from the 1998 and 2000 refueling outages had been reviewed nozzle-by-nozzle,[85] despite the fact that the review (performed by another FENOC employee, Andrew Siemaszko) had not yet been completed. The slides stated that the

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[82] Tr. at 1614-16.

[83] *See* Staff Ex. 20, Work Order at 1-13 (available in Staff Exhibits, Part 1, at 378-90). In actuality, the head was not completely cleaned as "boric acid crystal deposits of considerable depth" were left on the center top area of the head. *See* Staff Ex. 44, Letter from Gregory A. Gibbs, Piedmont Management & Technical Services, Inc., to Mark McLaughlin, Davis-Besse Nuclear Power Station (Sept. 14, 2001) at 1 (available in Staff Exhibits, Part 2, at 121, 121).

[84] *See* Stipulated Facts at 2-3.

[85] *See* Staff Ex. 55, FENOC Slides Presented at October 11, 2001 meeting with Commissioners' technical assistants, at 6-7 (available in Staff Exhibits, Part 2, at 163, 169-70).

reviews confirmed the absence of "popcorn" type boron deposits that would indicate leaking nozzles.[86]

Subsequent to the October 11 meeting, Mr. Siemaszko completed his review, which revealed that extensive boron deposits had blocked the camera from viewing a large number of nozzles during both inspections. Shortly thereafter, FENOC supplemented its Bulletin response with Serial Letter 2735, which acknowledged that by 1998, nineteen nozzles could not be seen in the inspections, and by 2000, twenty-four nozzles were obscured by boric acid deposits.[87] Serial Letter 2735 argued that, even disregarding the 1998 and 2000 inspections and starting with the 1996 inspection, the crack-growth-rate analysis showed that the reactor could operate safely until the 2002 refueling outage.[88]

It is undisputed that Mr. Geisen did not take part personally in any of the relevant past

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[86] *See id.* at 7 (available in Staff Exhibits, Part 2, at 170).

[87] *See* Staff Ex. 11, Serial Letter 2735 (Oct. 17, 2001) at 2-3 (available in Staff Exhibits, Part 1, at 136, 142-43). Serial Letter 2735 claimed that the boric acid was "clearly" from flange leakage, not from nozzle leakage. *Id.* at 3 (available in Staff Exhibits, Part 1, at 143). According to the Stipulated Facts, Serial Letter 2735 understated the number of nozzles that were not viewed in the 1996, 1998, and 2000 inspections. *See* Stipulated Facts at 6-7.

[88] *See* Staff Ex. 11, Serial Letter 2735 at 1 (available in Staff Exhibits, Part 1, at 141) ("Accordingly, using the end of the outage in 1996 as the postulated worst-case time for an axial crack to reach a through-wall condition, the projected time for the crack to reach its critical through-wall circumferential size was determined based on the results from a[] Framatome ANP assessment. This [reactor vessel] Head Nozzle and Weld Safety Assessment demonstrates the postulated crack will take approximately 7.5 years to manifest into an ASME Code allowable crack size.").

inspections (1996, 1998 and 2000). Mr. Geisen testified that, while he knew the "camera-on-a-stick" method FENOC had used in the past presented difficulties, he believed that a reliable inspection using this method was not impossible.[89]

The Staff objects to the majority's finding "that Mr. Geisen was only aware that the [camera-on-a-stick] inspection technique 'had its difficulties, but he was not aware that it physically precluded the ability to view all of the nozzles.'"[90] The Staff argues that Mr. Geisen "knew" that past inspections were inadequate because he knew that there was an outstanding request to cut additional holes in the service structure to facilitate inspections and cleaning. At the hearing, Mr. Geisen was asked repeatedly about this modification request. The Staff cites this exchange:

> Question: So going back again, the modification – you knew the modification [request] had been in place since 1994. Correct?
>
> . . . .
>
> Mr. Geisen: Correct.
>
> Question: To cut access holes. And you knew the access holes were being requested in that modification because they couldn't get to the entire head using a camera on a stick through a weep hole. Isn't that correct?

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[89] *See* Tr. at 1616; LBP-09-24, 70 NRC __ (slip op. at 79)).

[90] Staff Petition at 19 (quoting LBP-09-24, 70 NRC __ (slip op. at 79)).

Mr. Geisen: Correct.[91]

The majority, however, addressed this very passage, pointing out that in the same line of questioning, Mr. Geisen had stated that he did not know that the entire head could not be reached without the modification:[92]

> [Question:] I'm talking about a modification that's been in place since 1994. And I'm asking whether that modification, which has been in place since 1994, was there because you couldn't access the entire head through the weep holes. And you knew that, didn't you?
>
> [Mr. Geisen:] No.[93]

Earlier in the same day of testimony, Mr. Geisen stated that he thought the requested modification would make head cleaning and inspection easier, but not that the modification was necessary for those activities:

> [Question:] And were you, aware that [the requested modifications] were necessary because you could not clean the head unless you had those access holes?

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[91] *Id.* (quoting Tr. at 1958-59).

[92] *See* LBP-09-24, 70 NRC __ (slip op. at 80-81).

[93] Tr. at 1958.

> [Mr. Geisen:] No.
>
> [Question:] So that was new information to you in this email[?]
>
> [Mr. Geisen:] I didn't view it as a requirement. I viewed it as Mr. Siemaszko's requesting those to make it easier to do the viewing and cleaning.[94]

Continuing with the same line of questioning, Staff counsel asked:

> [Question:] And [Bulletin 2001-01] was looking for inspections that were sufficient to verify whether those nozzle indications were present, correct?
>
> [Mr. Geisen:] Correct.
>
> [Question:] And this would require an inspection of the entire head. Is that correct?
>
> [Mr. Geisen:] That is correct.
>
> [Question:] So the fact that you could not access the head through these mouse holes sufficiently to clean it was

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[94] *Id.* at 1872.

> a warning, wasn't it, that there were impediments to having that kind of complete inspection?
>
> [Mr. Geisen:] I did not take that statement that way when I read it.[95]

The majority also cited an August 17, 2001 e-mail message that, in its view, would have led Mr. Geisen to believe that it was not impossible to conduct a complete inspection. Mr. Geisen was sent a copy of an e-mail from the senior mechanical engineer for Design Basis Engineering, Prasoon Goyal (who had conducted the 1996 inspection and cleaning), indicating that the 1998 inspection was a "good" inspection.[96]

Although the passages of testimony that Staff cites in its brief[97] suggest that Mr. Geisen's testimony on the subject was not entirely "uncontroverted," as the majority put it,[98] the majority nonetheless found that Mr. Geisen repeatedly testified that he did not know that the camera-on-a-stick method rendered all past inspections incomplete. In light of his testimony to that effect, we find plausible the majority's finding

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[95] *Id.* at 1873.

[96] LBP-09-24, 70 NRC __ (slip op. at 79 (citing Staff Ex. 39); Staff Ex. 39, E-mail from Prasoon K. Goyal to sfyftch@framatech.com (Aug. 17, 2001) (available in Staff Exhibits, Part 2, at 111) ("Is it possible to go back to 1998 that is when a good head exam was done with no nozzle leakage[] (meaning not taking any credit for 2000 inspection)[?]")).

[97] *See* text associated with notes 91 and 93, *supra*.

[98] LBP-09-24, 70 NRC __ (slip. op. at 81).

that Mr. Geisen did not realize that past inspections were unreliable per se.

The Staff also argues that Mr. Geisen must have known that past inspections were inadequate, because he testified that the reason he procured a rover (or "crawler") for RFO 13, in 2002, was that he "didn't view the camera on a stick as even a viable option anymore."[99] The majority, however, interpreted Mr. Geisen's decision to procure the rover as simply a choice to use newer, superior technology for inspections.[100] Because (the majority observed) a rover's magnetic wheels would not work unless the head were clean, the majority also viewed Mr. Geisen's decision to procure a rover as evidence that Mr. Geisen believed that the head had been cleaned successfully after the 2000 inspection.[101] We find that the majority's interpretation of Mr. Geisen's actions with respect to procuring the rover was plausible. Consequently, Mr. Geisen's acquisition of a rover does not undermine the majority's finding that he did not know the extent of the limits of the past inspections.

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[99] Staff Petition at 20 n.51 (quoting Tr. at 1880). The cited portion of the transcript reads as follows:

> [Question:] So you knew though that using a camera on a stick you would have had a problem with an inspection[?]
>
> [Mr. Geisen:] Correct. But even if we were doing a visual inspection in 2002, we'd already made plans to do it using our crawler. So I didn't view the camera on a stick as even a viable option anymore.

Tr. at 1879-80.

[100] LBP-09-24, 70 NRC __ (slip op. at 82 & n.131).

[101] *Id.*

The Staff next challenges the majority's finding that Mr. Geisen thought that the focus of Bulletin 2001-01 was on how *future* inspections should be conducted to deal with the problem of potential nozzle leakage.[102] The Staff argues that Mr. Geisen knew the Bulletin sought specific information concerning *past* inspections. The record shows that Mr. Geisen's testimony supports the majority's finding.[103] The majority also cited testimony by the Staff's witness that would indicate that the Bulletin reflected a strong interest in how licensees would conduct future inspections.[104] In

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[102] Staff Petition at 19 (citing LBP-09-24, 70 NRC __ (slip op. at 25, 84-87)). The majority found that Mr. Geisen understood that the purpose of the additional Bulletin responses was not to prove that the past inspections were adequate, but to identify shortcomings in past inspections with a view to "providing a plan to the NRC as to how future inspections would meet future regulatory requirements." LBP-09-24, 70 NRC __ (slip op. at 25). *See also id.* at 84-85 (citing Mr. Geisen's testimony at Tr. at 1826-27).

[103] *See* Tr. at 1828-29 ("[Mr. Geisen:] [T]he section you are pulling out on page 4, as I read through that whole paragraph, I take that as identifying where there is an identified industry shortfall in how we do inspections. Now, did I then take that industry-identified shortfall and go back . . . and apply that as new criteria that I should have been applying to inspections I have done in the past? No, I did not do that. I took it as front information, and then when I got to the part where it says, 'The . . . addressees,' on page 11, 'will provide the following information,' the intent was to provide that information to the best ability, not to go back and revise inspection criteria of inspections that were done two to four year[s] earlier."). *See also id.* at 1824-27.

[104] *See* LBP-09-24, 70 NRC __ (slip op. at 14 (citing Tr. at 1205 (testimony of Staff witness Dr. Hiser))). The cited portion reads:

contrast, the only evidence the Staff cites[105] to contradict Mr. Geisen's claim that he thought future inspections to be the Bulletin's main focus consists of portions of Mr. Geisen's testimony where he either seems to be stating his understanding of the Bulletin much later (at the time of the NRC hearing),[106] or where he states that he understood the Bulletin to make a distinction between future and past inspections.[107] Such statements are not enough to convince us that the majority made a clear error in its finding on this issue.

> [T]he . . . overall goal [of the Bulletin] was to determine the status of each plant. We did not have sufficient knowledge in terms of the inspections that
>
> (continued . . .)
>
> licensees had implemented at previous outages before the Bulletin was issued. . . . [S]o . . . we didn't know if those inspections were adequate to address the concerns of the Bulletin. The Bulletin also then gathered information about future inspection plans by licensees.

Tr. at 1205. *See also* LBP-09-24, 70 NRC __ (slip op. at 15 (citing Tr. at 1254) (Staff witness Dr. Hiser)). The cited portion reads:

> [T]he purpose for gathering information . . . . wasn't so much to force actions by licensees, but [to] let them know . . . what appropriate actions were, and enable them to demonstrate that their prior actions met the bulletin['s] . . . expectations, or to give them the opportunity to implement inspections, in the future, that met the expectations of the bulletin.

Tr. at 1254.

[105] Staff Petition at 20-21.

[106] Tr. at 1820, 1826-27.

[107] *Id.* at 1878.

(2) WHETHER MR. GEISEN VIEWED VIDEOTAPES OF PAST INSPECTIONS IN EARLY OCTOBER 2001

The Staff claims that the majority erred in finding that Mr. Geisen had not seen inspection videotapes "in running fashion" in early October 2001 because Mr. Geisen admitted seeing "portions" of the tapes.[108] As discussed below, it is clear from the record that Mr. Geisen did view portions of the inspection videos at issue, and the majority acknowledges this.[109] In this regard, the Staff articulates no error.

The Staff's true concern appears to focus on the majority's use of the term "in running fashion" to describe how the inspection videotapes had been reviewed. The majority used this term at various points in its decision[110] but apparently intended "in running fashion" not to mean merely viewing a moving video image, but viewing the videos in "the manner in which the Staff played the tapes for the Board during the evidentiary hearing."[111] The majority, in fact, acknowledged that Mr. Geisen had seen "portions of the past inspection videotapes."[112]

The majority found that the first time Mr. Geisen saw the inspection videos was sometime between October 3 and October 11, 2001, when Mr.

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[108] Staff Petition at 21-22.

[109] LBP-09-24, 70 NRC __ (slip op. at 98).

[110] *Id.* at __ (slip op. at 98, 131, 139).

[111] *Id.* at __ (slip op. at 98). The transcript shows that the Board spent a fair amount of time on the first day of the hearing reviewing inspection tapes, with Staff witness Melvin Holmberg describing what can be seen on the tapes. *See* Tr. at 877-926.

[112] LBP-09-24, 70 NRC __ (slip op. at 98) (emphasis omitted).

Geisen met with Andrew Siemaszko concerning an assignment Mr. Siemaszko had been given relating to the Bulletin response.[113] Mr. Siemaszko was to review the tapes of the previous inspections and create a table showing which nozzles could be confirmed not to be cracked. During the meeting with Mr. Siemaszko, Mr. Geisen either looked at portions of videotapes of the inspections, or at still shots taken from digitized versions of the tapes that Mr. Siemaszko had made in order to facilitate his review. Mr. Geisen testified at the hearing that, at this meeting, Mr. Siemaszko had shown him still shots to demonstrate the criteria he was using to check each nozzle:

> [Mr. Geisen:] I swung by [Mr. Siemaszko's] desk and asked him how he's doing and that's when he informed me that he initially I guess attempted to do the frame by frame looking at videotape and that wasn't working out very well because every time he paused it, or whatever, you got a disturbance in the picture. It didn't pause well or you get lines or whatever. So he had transferred stuff over or was having the Training Department copy all the VHS tapes over to CD format, a digital format so that he could review them on his computer and then he could

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[113] *Id.* at __ (slip op. at 97-99). *See also id.* at __ (slip op. at 75-76) (noting that another engineering department held the inspection tapes and that "no evidence exists to establish any physical connection between Mr. Geisen and any reactor vessel head inspection videotapes until mid-October of 2001") (emphasis omitted).

> just with the space key or the up and down arrow key go digital frame by frame and then they came up clear.[114]

The testimony at the hearing supported the majority's view that Mr. Geisen saw only brief portions of the inspection videos:

> [Question:] Did there ever come a time during the [one-hour meeting with Mr. Siemaszko] that he hit play and let the tape roll for you so you could watch it the way we watched it the other day during this hearing?
>
> [Mr. Geisen:] No. The real focus was he was – the discussion went more along the lines of not here's the video, but here's the still frame and this is the methodology that I'm using. Because I was really asking about the methodology, what was his acceptance criteria, what was the methodology he was using.[115]

The Staff notes that the majority acknowledged that Mr. Geisen's actions would be "tainted" if he saw videos "in running fashion."[116] It then cites portions of the transcript of an Office of Investigations interview with Mr. Geisen that took

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[114] Tr. at 694-95.

[115] *Id.* at 1697.

[116] Staff Petition at 21 n.54 (citing LBP-09-24, 70 NRC __ (slip op. at 139-40)).

place in October 2002, where Mr. Geisen stated that he had looked at some "portions" of the tapes sometime in October 2001.[117] But the Staff seemingly does not recognize, or does not acknowledge, that the majority decision uses the term "in running fashion" to mean more than simply that the images were moving. Further, even if the majority meant "in running fashion" to refer to *any* moving image, the Staff does not explain what difference this "error" of fact would make to the outcome of this proceeding.

Possibly, the Staff is echoing Judge Hawkens's observation that Mr. Geisen likely "reviewed closely all three inspection videos" immediately after his meeting with Mr. Siemaszko and realized that the inspections were more limited in scope than the information submitted to the NRC would reveal.[118] In the sections of the Office of Investigations interview that the Staff cites, however, Mr. Geisen only states that he saw "portions" of the tapes.[119] The Staff offers no evidence showing that Mr. Geisen performed the "careful" review that Judge Hawkens suggests he might have done.

Nothing in the Staff Petition contradicts the majority's interpretation, nor does it persuade us that the majority's finding on this point would make a difference in the outcome of the proceeding. Therefore, we find no clear error in the majority's statements that Mr. Geisen did not view the

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[117] *Id.* at 22-23 (citing Staff Ex. 79, Office of Investigations Interview (Oct. 29, 2002) at 108-09, 144-45 (ML100480577).

[118] *See* LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 40). The majority opinion responds to this comment, which it calls "speculation." *Id.* at __ (slip op. at 139).

[119] *See, e.g.*, Staff Ex. 79, at 61, 108-09, 156.

inspection videotapes "in running fashion" at the beginning of October 2001.

(3) WHETHER MR. GEISEN KNEW HE WAS RESPONSIBLE FOR THE SERIAL LETTERS' TECHNICAL ACCURACY

The Staff argues that the majority erred in finding that Mr. Geisen was "specifically not 'the FENOC manager responsible for ensuring the completeness and accuracy' of the content in Serial Letter 2731," and in finding that his sole role in the review process was to determine whether the reviewed documents were inconsistent with his own department's knowledge or policies.[120] The Staff argues that Mr. Geisen "knew he was responsible for the Technical Accuracy of the Serial Letters."[121] The Staff claims that the majority's finding contradicts both the plain language of the "Green Sheet"[122] and Mr. Geisen's own testimony.[123]

Apparently, the Staff's dispute is not so much with the majority's finding that Mr. Geisen was not the manager in charge of responding to the Bulletin, as it is with the significance that the majority attributed to that finding. The Staff argues that the majority made a legal ruling that a person cannot be held responsible for knowingly concurring in materially incomplete and inaccurate

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[120] Staff Petition at 23 (quoting LBP-09-24, 70 NRC __ (slip op. at 23), and citing *id.* at __ (slip op. at 17, 59)).

[121] *Id.*

[122] *Id.* (citing Staff Ex. 10, FENOC, "NRC Letters – Review and Approval Report (Serial No. 2731") at 3 (available in Staff Exhibits, Part 1, at 131, 135)). The "Green Sheet" is the cover page to a draft document, which was circulated as part of the internal review and approval process employed by FENOC at Davis-Besse. *See* Tr. at 1638-43.

[123] Staff Petition at 23 (citing Tr. at 1902).

representations as long as he can point to someone more directly responsible for the representations.[124] But the majority made no such ruling. Rather, the majority found that Mr. Geisen did not know the truth because of the manner in which he carried out his duties with respect to the review.

The majority's finding has support in the record.[125] Mr. Geisen testified that he did not understand that he was personally responsible for verifying the accuracy of every technical representation in the Serial Letters:

> [Question:] During the course of the litigation of this case, I take it, you have read the back of the green sheet and what it tells signatories that [*sic*] their responsibilities are, correct?
>
> [Mr. Geisen:] Correct.

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[124] The Staff describes the majority's ruling as finding that "because Mr. Geisen was not the responsible manager, he was not culpable for the materially incomplete and inaccurate representations contained in Serial Letter 2731." *Id.* According to the Staff, the majority held that, even if Mr. Geisen knew Serial Letter 2731 contained false statements when he signed it, the NRC could still not "hold him accountable for this knowledge because another manager may have had greater responsibility" and that "the NRC could never hold a knowledgeable individual accountable for an inaccurate and incomplete document as long as the individual could [point to] someone with greater responsibility." *Id.* at 23-24.

[125] *See* LBP-09-24, 70 NRC __ (slip op. at 58-59 (citing Tr. 1639-40)).

> [Question:] And one of the responsibilities for a manager is to verify the technical accuracy, correct?
>
> [Mr. Geisen:] Correct.
>
> [Question:] At the time that you signed the green sheet, had you gotten any training in what your responsibility was?
>
> [Mr. Geisen:] No. I believed when I signed it I was – I was doing a good review. I don't believe that's the case now, but I believed at the time I was doing a good review.[126]

The majority found Mr. Geisen's testimony credible. The majority observed: "without any evidence directly linking Mr. Geisen to the development of Serial Letter 2731, we cannot reasonably attribute to Mr. Geisen more knowledge than [that of] the engineers, supervisor, and manager directly responsible for the work in question who had all previously signed the Green Sheet."[127]

Given the discussion in the record on this point, we do not find clear error in the majority's observations about how Mr. Geisen viewed his role.

(4) WHETHER MR. GEISEN KNEW HIS STATEMENTS TO THE COMMISSIONERS' TECHNICAL ASSISTANTS WERE INACCURATE

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[126] Tr. at 1641-42.

[127] LBP-09-24, 70 NRC__ (slip op. at 59).

The Staff argues that Mr. Geisen knew that statements made during an October 11, 2001 briefing and slide presentation to the Commissioners' technical assistants were materially inaccurate.[128] The majority found that Mr. Geisen believed he was being truthful when he presented slides indicating that the nozzles had been checked for the popcorn-like deposits and that there was no evidence of leakage.[129] As discussed below, we do not find the majority's ruling clearly erroneous.

According to the stipulated facts, Mr. Geisen and other FENOC managers met with the Commissioners' assistants in October 2001 to present a safety argument for allowing Davis-Besse to continue operations until its next scheduled refueling outage in March 2002.[130] In attendance were FENOC employees Guy Campbell, Site Vice President of Davis-Besse; Stephen Moffitt, Technical Services Director at Davis-Besse; David Lockwood, FENOC's Director of Regulatory Affairs; and Mr. Geisen.[131] A slide presentation was prepared the night before the meeting by these employees as well as Gerry Wolf, also with FENOC's Regulatory Affairs office, and Ken Byrd, an engineer assigned to manage the creation of the crack-growth model.[132]

At the meeting, Mr. Geisen presented two slides that discussed the results of past inspections.[133] One of these, "Slide 7," stated that all CRDM penetrations were "verified" to be free of the

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[128] Staff Petition at 24-25.

[129] LBP-09-24, 70 NRC__ (slip op. at 103-05).

[130] Stipulated Facts at 4.

[131] LBP-09-24, 70 NRC __ (slip op. at 100).

[132] *Id.* at __ (slip op. at 101 (citing Tr. at 1690-91, 1726))

[133] Stipulated Facts at 4-5.

"popcorn" type boron deposits that indicate nozzle cracking.[134] But in actual fact, the nozzles could not be verified to be free of these deposits because massive boron deposits obscured many nozzles.[135]

The majority found that even though Mr. Geisen's statements at the meeting were inaccurate, they were consistent with his "general understanding . . . of the facts at hand."[136] According to the Staff, the majority based this general finding on its underlying findings that when the presentation slides were prepared: "(1) '[o]thers in the room plainly knew more than Mr. Geisen on these matters' and (2) no one contradicted the information Mr. Geisen was using for the slides and presentation."[137]

The Staff disputes the majority's finding that "others in the room were more knowledgeable than Mr. Geisen" when the team met to prepare slides. The Staff argues that this finding is inconsistent with Mr. Geisen's own testimony that "he was the 'scribe' for developing the slides on his laptop and that he believed he put in the information regarding past inspections because he was the most knowledgeable person there about inspections."[138]

But the majority's observation that "others . . . were more knowledgeable" was not about which manager knew the most about "inspections" generally. The majority was concerned about which persons in the room knew most about the true

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[134] *Id.* at 5.

[135] *Id.*

[136] LBP-09-24, 70 NRC __ (slip op. at 104).

[137] Staff Petition at 24 (quoting LBP-09-24, 70 NRC __ (slip op. at 104)).

[138] *Id.* (citing Tr. at 1924-25).

condition of the reactor head.[139] Given the various factors the majority discusses in its lengthy opinion concerning Mr. Geisen's other duties and his reliance on others for accurate information, it was not unreasonable for the majority to find that others knew more than Mr. Geisen about the reactor head's condition.[140]

In addition, the Staff points out that Slide 7 stated that all nozzles "were verified to be free" from boron[141] despite the fact that "Mr. Geisen knew that Davis-Besse had not yet completed this verification because he was responsible for overseeing it."[142] Mr. Geisen testified that, even though he knew that the table Mr. Siemaszko was preparing had not yet been completed, he believed that this verification had been done during the past two inspections:

> [Judge Trikouros:] But did you speak to Mr. Siemaszko? I guess a week earlier you had that telephone call, the assignment was made for nozzle-by-nozzle table development. Did you speak to him at all during the following week that preceded this meeting?
>
> [Mr. Geisen:] He was – I did meet with him prior to this meeting to . . . check his methodology that he was using for

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[139] LBP-09-24, 70 NRC __ (slip op. at 104).

[140] *See, e.g., id.* at __ (slip op. at 57-59).

[141] Staff Petition at 24 (quoting Staff Ex. 55, at 7) (available in Staff Exhibits, Part 2, at 170).

[142] *Id.* (citing Tr. at 1720-21, 1925, and Staff Ex. 71, (David Geisen testimony transcript at Geisen criminal trial at 1910) (ML100480730).

> doing that . . . nozzle-by-nozzle verification table. I cannot say that I specifically spoke to him about the word-by-word bullet that is in here, that I got it from him. There may have been things that he talked about in the process of describing his technique that I absorbed to create this bullet. But at the time this was delivered, I believed that between 1998 or . . . 2000, we had a good look at each nozzle. And it wasn't until after I got the nozzle table back from Mr. Siemaszko shortly after this presentation, that I realized that we had [spoken] in error. And that's when I brought it to the attention of Mr. Moffitt and Mr. Lockwood.[143]

Mr. Geisen also testified that during the briefing he relied for his information on Serial Letter 2731 – a letter he did not draft – as well as on input from others who participated in developing the slide presentation.[144] He further testified that he never claimed during the meeting that he personally had verified this information.[145]

The Staff also argues that "either Mr. Geisen made up the information or he lied"[146] because he testified that "he used only the information contained in Serial Letter 2731 to create the slides, yet he acknowledged that Serial Letter 2731 contained no information to support those

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[143] Tr. at 1931-32.

[144] *Id.* at 1925-26.

[145] *Id.* at 1927-28.

[146] Staff Petition at 25.

representations."[147] But the transcript portions the Staff cites show only that Mr. Geisen could not identify the precise source of all the information presented in the slides.[148] This is consistent with the

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[147] *Id.* at 24-25 (citing Tr. at 925, 1928-29, 1943, 1944).

[148] *See, e.g.*, Tr. at 1925-26:

> [Question:] The only – is it correct to say that the only information you had still at this time was from reading serial letter 2731?
>
> [Mr. Geisen:] That's correct. It may have been also from some side bars with – because there were other people that participated in the development of the slides, so they may have brought stuff to the discussion, as well.

Tr. at 1928-29:

(continued . . .)

> [Question:] . . . Now, would you please direct our attention to where it says [in Serial Letter 2731] that all of the nozzle penetrations were verified to be free of popcorn deposits?
>
> [Mr. Geisen:] It doesn't use those exact words in there.
>
> [Question:] And what words did you rely on
>
> [Mr. Geisen:] . . . I took the information that was in 2731, call it absorbed, became my frame of reference, and from that frame of reference made the statement . . .
>
> [Question:] Well, can you show us what words gave you that information?
>
> [Mr. Geisen:] The fact that the review was conducted to reconfirm that indications of boron leakage at Davis-Besse nuclear power station were not similar to those indications seen at ONS and ANO-1. That's in the bullet for subsequent review of 1998 and 2000 inspection video tapes.

Tr. at 1943:

> [Judge Trikouros:] And the source of that information is not clear to you at all.

majority's finding that the information contained in the slides was decided by consensus.[149] The testimony cited by the Staff does not, in our view, establish that Mr. Geisen knew that the information was inaccurate.

The Staff argues that Mr. Geisen knew at the time that the material in the presentation was inaccurate. As discussed above, the Staff relies principally on showing claimed inconsistencies in Mr. Geisen's own testimony at the hearing, but it provides no evidence that Mr. Geisen actually knew at the time of the meeting that the material was inaccurate. The Staff has offered, for example, no evidence from anyone who was present at the FENOC meeting when the slides were prepared to suggest that Mr. Geisen was told that the information to be presented was inaccurate. In short, at the hearing the Staff needed to convince the Board that either the attendees of the preparatory meeting concurred in the deception, or that Mr. Geisen knew of the inaccuracy and kept it to himself. But the transcript portions the Staff cites, discussed above, contain no information to support either argument.

The majority also found it significant that Mr. Geisen immediately alerted his management that the information presented to the Commissioners' assistants had been in error upon reviewing Mr. Siemaszko's nozzle-by-nozzle table completed shortly

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> [Mr. Geisen:] I believe the majority of that information came from my understanding of 2731.

[149] LBP-09-24, 70 NRC __ (slip op. at 101) ("[E]ach of these individuals [at the preparatory meeting] agreed with the accuracy of the information in all of the Powerpoint slides.").

after the meeting.[150] Mr. Geisen testified at the hearing, and Stephen Moffitt testified at the criminal trial, to this effect.[151] That Mr. Geisen immediately took steps to alert others of the errors indicated to the majority that he was not aware that the information presented to the Commissioners' assistants was inaccurate when he presented it at the meeting days earlier. We agree with the Board majority that Mr. Geisen's prompt reporting of the contradictory information implies a lack of knowledge beforehand.

As with many of the facts surrounding how the situation unfolded at Davis-Besse, the question how Mr. Geisen came to prepare the slides and give the presentation to the Commissioners' technical assistants is complicated by the number of individuals involved and the large volume of testimony – much of it re-plowing the same ground. On the one hand, the Staff cites portions of Mr. Geisen's testimony where he avers that he generally was knowledgeable about the conditions at the plant. On the other, the majority credits his straightforward statements that he relied on others to provide accurate information in creating the slides that would be presented. At most, the Staff's arguments suggest that the majority could have received Mr. Geisen's statements with greater skepticism. Based on the record, the Board might well have determined that Mr. Geisen's testimony was not credible and ruled in favor of the Staff. But this possible alternative resolution of the case does

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[150] *Id.* at __ (slip op. at 101-02, 104).

[151] Tr. at 1721, 1931-32, 1946-47; Transcript of Trial, *United States v. Geisen*, Docket No. 3:06- CR-712 (N.D. Ohio) (Oct. 11, 2007), Tr. Vol. 7, at unnumbered p. 92 (ML092920148).

not equate to finding no evidence in the record supporting the majority's view.

In the end, the majority weighed the evidence and, overall, found Mr. Geisen's version of events and of his own state of mind credible. Given that this finding of fact turns largely on Mr. Geisen's credibility as a witness, we see no clear error in the majority's ruling.

c. Conclusion

That the majority gave greater weight to Mr. Geisen's evidence than to the Staff's evidence is not a basis for overturning the majority's findings of fact. Such weighing of evidence and testimony is inherent in, and at the very heart of, adjudicatory fact-finding – an area where we have traditionally deferred to our licensing boards.[152] Regardless of whether we would have made the same findings as the majority were we in its position,[153] we recognize here that the majority's factual analysis and findings are detailed, thorough, internally consistent, and supported by record evidence. Further, the Board had the significant advantage, unavailable to us, of observing the witnesses firsthand and judging their demeanor and credibility. For these reasons, we decline to overturn the Board majority's findings of fact.

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[152] *See, e.g., AmerGen Energy Co., L.L.C.* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009).

[153] *See Watts Bar*, CLI-04-24, 60 NRC at 189 ("'We will not overturn a hearing judge's findings simply because we might have reached a different result.'") (quoting *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998) (in turn quoting *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987))).

3. Legal Challenges

Our reviews of boards' legal conclusions are more searching than our reviews of their findings of fact. We review legal questions *de novo*, and will reverse a board's legal conclusions if they depart from or are contrary to established law.[154]

a. The Weight the Majority Assigned to Circumstantial Evidence

The Staff criticizes the majority for affording "more weight to the absence of certain pieces of direct evidence than to the totality of circumstantial evidence."[155] For instance, the Staff asserts that the majority gave more weight to the Staff's decision not to put on any witnesses to incriminate Mr. Geisen than to the cumulative weight of direct and circumstantial evidence that, in the majority's view, illustrated Mr. Geisen's actual knowledge that his statements were false.[156] The Staff points out that it is permitted to prove its case using either direct or circumstantial evidence and that the two carry equal probative value.[157] According to the Staff, the

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[154] *See id.* at 190.

[155] Staff Petition at 9 (citing LBP-09-24, 70 NRC __ (slip op. at 28, 63 n.112, 131-32), and citing favorably Judge Hawkens's dissent, LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 57 n.43)).

[156] *Id.* (citing 70 NRC __ (slip op. at 27-28 and 132 (discussing the significance of lack of direct testimonial evidence))). *See also id.* at 10 n.26 (citing LBP-09-24, 70 NRC __ (slip op. at 132-33), and LBP-09-24, 70 NRC __ (slip op., Dissenting Opinion at 57 n.43)).

[157] *Id.* at 9-10 (citing *Desert Palace v. Costa*, 539 U.S. 90, 99-100 (2003); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) ("As in any lawsuit, the plaintiff may prove

majority's balancing contravenes established evidentiary law and therefore requires a reversal.

As with its argument regarding the so-called "Five-Factor Test," discussed above, the Staff here dresses up a factual argument as a legal one. The majority weighed and balanced numerous factors in reaching its factual findings. In that process, it necessarily determined how much weight to give the circumstantial evidence upon which the Staff relied. The fact that the majority assigned less weight to such evidence than the Staff would prefer does not mean that the majority made a legal determination that all (or even some) circumstantial evidence must be ignored *because* of its circumstantial nature. Had the Board actually made *that* determination, it would have committed legal error for the reasons set forth by the Staff. Yet we see nothing in the majority's decision to suggest that it did so.[158] And absent such a legal determination, the degree of consideration the Board paid to the Staff's circumstantial evidence falls squarely within the

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his case by direct or circumstantial evidence."); *Doe v. U.S. Postal Serv.*, 317 F.3d 339, 343 (D.C. Cir. 2003) (the court "draw[s] no distinction between the probative value of direct and circumstantial evidence")).

[158] Indeed, the majority explicitly stated that it did "not dispute that circumstantial evidence can be compelling." LBP-09-24, 70 NRC __ (slip op. at 132). Elsewhere, it raised the question whether "the quality of circumstantial evidence [was] sufficient to give rise to a finding that the person charged actually knew the information" – a question that would have been irrelevant to the Board had it determined to ignore all of the Staff's circumstantial evidence. *Id.* at __ (slip op. at 31). And finally, the Board actually complimented the Staff for its "commendable effort [in] drawing upon an abundance of circumstantial evidence [to] support[] the underlying charges of the Enforcement Order." *Id.* at __ (slip op. at 134).

bounds of a factual finding related to weighing evidence. We therefore defer to the majority, just as we did in the preceding section of today's decision, where we examined the Staff's challenges to the majority's findings of fact but found no clear error.

b. Majority's Improper Reliance on "Sanctions" Evidence in "Violation" Determination

On the final day of the five-day evidentiary hearing, when the Board was considering the appropriateness of the Enforcement Order's penalty,[159] Mr. Geisen offered into evidence the NRC Office of the Inspector General's 2004 Semiannual Report to Congress.[160] The OIG Report addressed, among many other things, the adequacy of the Staff's response to the corrosion problem at Davis-Besse during 2001 and 2002.[161] As relevant here, it stated that "[t]he Davis-Besse Senior Resident Inspector and the Resident Inspector and possibly a Region III based inspector" had seen a FENOC Condition Report,[162] which included a so-called "Red

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[159] The Board devoted the first four days of the enforcement hearing to the violation issue, and the final day (Friday, December 12, 2008) to the sanctions/penalty issue. *See* Tr. at 793-2004(violation), 2005-2342 (sanctions); Staff Petition at 10 n.28.

[160] Geisen Ex. 27, NUREG 1415, Vol. 16, No. 2, "[NRC] Office of the Inspector General Semiannual Report to Congress" (Apr. 2004) (ML092610792) (OIG Report). *See* Tr. at 2202-03 (submitted), 2296-2302 (admitted into evidence).

[161] OIG Report at 12.

[162] Staff Ex. 19, Condition Report 2000-0782 (Apr. 6, 2000) (available in Staff Exhibits, Part 1 at 364). Condition Report 2000-0782 was prepared by a Davis-Besse engineer in April 2000 at the beginning of Davis-Besse RFO 12. *See* OIG Report at 12.

Photo,"[163] but that they had failed to recognize "the significance of the boric acid corrosion."[164] The OIG Report's focus was the actions of the NRC staff and not the actions of the licensee or its employees.

Mr. Geisen introduced the OIG Report in an apparent effort to rebut the Staff's claim that he must have known of the significance of the corrosion, yet did not inform the NRC.[165] We understand that Mr. Geisen introduced the report to show that the NRC inspectors' own failure to appreciate the significance of the corrosion lends credence to his own claim that he merely had failed to recognize this significance rather than that he intentionally had hidden that significance from the NRC.[166] In addition, Mr. Geisen argued that the OIG Report draws into question the integrity of the fact-finding investigation that led up to the Enforcement Order.[167]

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[163] The "Red Photo" was a "photograph of the reactor vessel head prior to the cleaning, that showed what Mr. Geisen believed to be flange leakage flowing in a lava-like fashion from some mouseholes at the bottom of the reactor vessel head." LBP-09-24, 70 NRC ___ (slip op. at 63 (citing Tr. at 1569)).

[164] OIG Report at 12.

[165] *See* Tr. at 2206-07. *See also id.* at 1289 (Dr. Hiser: "[The Red Photo] should tell almost any engineer that there is a significant problem there at Davis-Besse."), 1292 (Dr. Hiser: "I would hope that [the photo's significance would be] fairly obvious to pretty much all engineers.").

[166] *Post-trial Brief of David Geisen with Proposed Findings of Fact and Conclusions of Law*, at 45 (Jan. 30, 2009) ("No one explained how the Red Photo which was given to the Resident Inspector and made no impression on him was somehow to make a greater impression on everybody at Davis-Besse who saw it.").

[167] Tr. at 2208 (Mr. Geisen's counsel to Staff witness Mr. O'Brien: "Did you take into consideration the findings of the OIG into what you decided about the credibility and integrity of

The Staff objected at the hearing to the Board's consideration of the OIG Report, arguing that it concerned the Staff's rather than Mr. Geisen's knowledge and performance, and was therefore irrelevant to the enforcement proceeding, where only Mr. Geisen's knowledge and actions were at issue.[168] The Board assured the Staff that it would not rely on the OIG Report when deciding whether to find Mr. Geisen in violation of the NRC's regulations.[169] Specifically, the Board promised that its "decision on Mr. Geisen's liability [would be] based on the evidence [it] heard from Monday through Thursday," during the "violation" phase of the hearing,[170] and not evidence received on Friday, December 12, 2008, during the "sanctions" phase. But when the majority issued LBP-09-24, it overlooked this commitment. Relying specifically on the Report's statement that NRC inspectors had not recognized the significance of the Condition Report and the "Red Photo" as it related to possible boric acid corrosion, the majority concluded that "we cannot fairly infer that, Mr.

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the information you were considering and on the sanctions that you ultimately imposed on Mr. Geisen?"), 2297-98 (Mr. Geisen's counsel).

[168] *Id.* at 2204 (Staff counsel: "I have to object. This is completely immaterial, what the . . . OIG investigated about conduct of the Staff."), 2296 (Staff counsel: "I would question the relevance of it.").

[169] *Id.* at 2157-59.

[170] *Id.* at 2157 (Judge Farrar). *See also id.* at 2158-59 (Judge Farrar: "if Mr. O'Brien said, 'Now that I think about it, I don't think he's guilty,' we might still find him guilty *based on the evidence we heard from you from Monday through Thursday.*" (emphasis added)).

Geisen must have known of its ramifications, when others did not."[171]

On appeal, the Staff argues that the majority committed prejudicial procedural error by relying upon the OIG Report's statement. The Staff complains that it relied upon the Board's assurances and therefore presented no rebuttal evidence on the matter insofar as the statements in the OIG Report related to Mr. Geisen's asserted regulatory violation.[172] The Staff claims that, absent such assurances from the Board, it "would have sought to rebut such evidence when it was submitted."[173]

We agree with the Staff that the Board erred. Mr. Geisen submitted the OIG Report into evidence during the "sanctions" portion of the hearing. When admitting the report into evidence, the Board committed not to consider it when determining whether to sustain the Staff's finding of violation. Yet the majority did take the OIG Report into account when making that determination. Consequently, we find that the majority either should not have considered the OIG Report when determining whether Mr. Geisen had violated our regulations or should have given the Staff an opportunity to present rebuttal evidence.[174]

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[171] LBP-09-24, 70 NRC __ (slip op. at 64) (emphasis omitted). *See also id.* at __ (slip op. at 65) ("[I]t is a fact that at least one key Staff official was no better at diagnosing the disastrous potential of what was seen than was Mr. Geisen. . . . We are unwilling to impute to Mr. Geisen knowledge that the Staff was unable to derive for itself . . . .") (emphasis omitted).

[172] Staff Petition at 10-11.

[173] *Id.* at 11.

[174] It appears the Board invited the Staff to brief the issue of the OIG Report's admissibility (Tr. at 2299 (Judge Hawkens),

But to prevail on appeal, the Staff must show not only that the majority erred but also that the error had a prejudicial effect on the Staff's case.[175] Despite acknowledging this burden of proof in its petition for review,[176] the Staff articulated no explanation of how it had been prejudiced by the majority's reliance upon the OIG Report. Indeed, the Staff's only mention of prejudice in this context is one conclusory sentence in its petition for review: "[b]y inappropriately allowing the [OIG] Report to be introduced for the purpose of determining liability, despite the Board's statements to the contrary, the Staff was prejudicially harmed by the Majority's action."[177]

2301 (Judge Farrar)); but that the Staff did not take advantage of this opportunity.

[175] *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n.28 (1985) ("We expect parties taking appeals on purely procedural points to explain precisely what injury to them was occasioned by the asserted error." (citation omitted)); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984) ("[A] mere demonstration that the Board erred is not sufficient to warrant appellate relief. 'The complaining party must demonstrate actual prejudice – *i.e.*, that the ruling had a substantial effect on the outcome of the proceeding.'" (quoting *Louisiana Power and Light Co.* (Waterford Steam Electric Station), ALAB-732, 17 NRC 1076, 1096 (1983))).

[176] Staff Petition at 3 n.8.

[177] *Id.* at 11. We repeatedly have stated that we will not consider cursory, unsupported arguments. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002); *Northeast Nuclear Energy Co.* (Millstone Nuclear (continued . . .) Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 204 n.6 (2000).

Had the Staff submitted an offer of proof to us, indicating what rebuttal evidence it would have offered to the Board, then we might have some basis for determining whether that evidence would be substantial enough to justify a remand to the Board.[178] But the Staff provides us no offer of proof.[179] We therefore find ourselves in the same situation as the Appeal Board in *Pilgrim* a quarter-century ago: "[f]or all we know, [the appealing party's] case . . . is so weak that . . . the denial of [a] right [to reply] by the Licensing Board would have been harmless error."[180]

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[178] *See generally Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-255, 1 NRC 3, 7 (1975).

[179] From the argument at hearing, we could infer that the Staff would have attempted to show that no NRC inspector saw the Red Photo before the corrosion was discovered in March 2002. *See* Tr. at 1292 (Staff counsel: "Your Honor, just for clarification, there is nothing in the record, at least so far, that indicates that a resident inspector saw this photo or received it or anything of that nature"). *See also id.* at 2297 (Staff counsel) ("Mr. Simpkins [a resident inspector at Davis-Besse] actually testified in Mr. Siemaszko's criminal trial . . . several times that to the best of his recollection he had never – he didn't receive the red photo. . . . Mr. Simpkins testified that he doesn't recall ever seeing the red photo during the period in question.").

[180] *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n.28 (1985) (citation omitted). The Appeal Board in *Shoreham* also specifically pointed to the intervenor's failure to make an "offer of proof in connection with any affirmative expert testimony it would have put forward." *Shoreham*, ALAB-788, 20 NRC at 1155-56. *Compare Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-778, 20 NRC 42, 49 (1984), where the Appeal Board ruled that a Licensing Board had erred in holding it lacked authority to consider contentions based on recent revisions to a license application, but that the error was

Indeed, our review of the adjudicatory record in this proceeding suggests that the majority's consideration of the OIG Report had little to do with its conclusion that Mr. Geisen did not violate section 50.5(a)(2). It appears the majority did not consider the "Red Photo" to be the "smoking gun" that the Staff considered it to be. As an initial matter, the majority found credible Mr. Geisen's testimony that, when he saw the Red Photo during the 2000 refueling outage (RFO 12), "it did not create any alarm or strike him as a warning that any pressure boundary leakage issue existed."[181] Further, the majority found that even if Mr. Geisen had realized, when he saw the Red Photo, that it indicated a serious problem with the reactor head, he would not necessarily have connected that photo with the information in the Bulletin response he was asked to review:

> even if Mr. Geisen had recalled the Red Photo as alerting him to the condition of the reactor vessel head from the 2000 outage, the information in Serial Letter 2731 does not on its face appear to contrast so significantly with that knowledge that it would catch the attention of one whose role in that letter was so minimal. Mr. Geisen is not being charged with failing to identify a corrosion issue as illustrated in the Red Photo. He is charged with deliberately providing incomplete and inaccurate

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harmless because the intervenor had never submitted any contentions on the revisions.

[181] LBP-09-24, 70 NRC __ (slip op. at 64 (citing Tr. at 1570)).

information by signing the Green Sheet review for Serial Letter 2731.[182]

The majority cited the OIG Report's statement that an NRC inspector or inspectors saw the photo "not to suggest [a] dereliction of duty" by the NRC staff but to show that the photo may seem more significant with the benefit of "hindsight."[183] It does not appear that the majority placed a great deal of weight on an implicit comparison of the NRC inspectors' reactions with Mr. Geisen's reaction to the photo. As we read the majority's decision, its reliance upon the OIG Report was cumulative at most; it merely supplemented many other reasons for the majority's decision regarding the violation, and had no direct bearing on the question whether Mr. Geisen violated our regulations, as specified in the Enforcement Order. The OIG Report, in short, did not have "a substantial effect on the outcome of the proceeding."[184]

In sum, while the Board indeed erred in considering the OIG Report without permitting the Staff to offer rebuttal evidence, the Staff has failed to show that this mistake worked to its disadvantage. The record does not show that the Board majority might have reached a different result had it handled the OIG Report properly. We therefore conclude that the Board's action amounts to harmless error.

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[182] *Id.* at __ (slip op. at 65) (emphasis in original).

[183] *Id.* at __ (slip op. at 64).

[184] *Shoreham*, ALAB-788, 20 NRC at 1151.

c. The Majority's Decision Not to Apply Collateral Estoppel

On appeal, the Staff challenges the majority's refusal to apply collateral estoppel to establish Mr. Geisen's culpability with respect to one of the communications that formed the basis of both his criminal conviction and the Enforcement Order.

The parallel criminal prosecution against Mr. Geisen charged him with five counts of submitting materially false information to the government relating to the events at Davis-Besse, in violation of Title 18 of the U.S. Code. Mr. Geisen was convicted on counts 1, 3, and 4 of the criminal indictment.

Count 4 of the criminal indictment dealt exclusively with representations in Serial Letter 2744, which was among the last communications from FENOC to the NRC relating to the Bulletin, sent on October 30, 2001.[185] While the letter was intended to correct misinformation sent in FENOC's earlier responses to Bulletin 2001-01, information in the letter was still inaccurate and misleading.[186] Count 4 of the criminal indictment listed six different aspects in which Serial Letter 2744 was misleading, including (as relevant here): overstating the number of nozzles capable of being viewed in

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[185] Counts 1 and 3 pertained to alleged misrepresentations in Serial Letter 2741, which was not mentioned in the Enforcement Order. Mr. Geisen has appealed his conviction. *See supra* note 24.

[186] For example, while Serial Letter 2744 acknowledged that many nozzles could not be seen due to boron accumulation during the 1998 and 2000 inspections, it understated the number of nozzles that could not be seen. In addition, Serial Letter 2744 stated that 65 of 69 nozzles were viewed in the 1996 inspection, although fewer nozzles could be viewed at that time. *See* Stipulated Facts at 8-9.

past inspections, and stating that photos attached to the letter, which showed relatively little boron accumulation, were representative of the head's condition when in fact they were not.[187] The jury returned a general verdict of "guilty" on Count 4.

Prior to the evidentiary hearing, the Staff moved for the Board to apply the collateral estoppel doctrine to the issue of whether Mr. Geisen knew that Serial Letter 2744 contained materially false information when he concurred in its release.[188] The Staff reasoned that, if the Board applied collateral estoppel to issues decided in the criminal proceeding, Mr. Geisen would be prevented from raising the defense that he did not know Serial Letter 2744 was false and misleading when he approved it.

Because the Enforcement Order referred to more asserted misrepresentations than those in Serial Letter 2744, however, applying collateral estoppel would not eliminate the need for a hearing entirely, but only limit its scope. The Board therefore declined to rule on collateral estoppel before the hearing in order to avoid possible "inefficiencies and delays . . . as counsel sparred over whether particular pieces of evidence were barred by that scope ruling."[189]

In its merits decision, the majority rejected the Staff's motion to apply collateral estoppel, and chose to evaluate for itself whether the Staff had proved that Mr. Geisen knowingly provided false and misleading information with respect to all of the communications referenced in the Enforcement

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[187] Indictment at 13.

[188] *NRC Staff Motion for Collateral Estoppel* (Nov. 17, 2008) (Motion for Collateral Estoppel).

[189] LBP-09-24, 70 NRC __ (slip op. at 35).

Order, including those associated with Serial Letter 2744. The majority stated that even if all the necessary elements of collateral estoppel were present (on which it made no express finding), discretionary factors weighed strongly in favor of rejecting its use in this proceeding.[190]

Judge Hawkens, however, found that all the necessary elements of collateral estoppel were met as to Serial Letter 2744.[191] Further, Judge Hawkens argued that there is a "compelling public interest" in preserving public faith in the adjudicatory process by avoiding inconsistent results, and concluded that this must outweigh any "private interest" Mr. Geisen might have in relitigating the issue of whether he knowingly made material false statements to the government.[192]

Fundamentally, the majority questioned whether the prerequisites of collateral estoppel were met as to the findings regarding Serial Letter 2744 in this proceeding, because the general jury verdict prevented the Board from knowing whether the issue sought to be precluded was identical to the issue decided in the criminal action. Without overtly addressing the requirements of collateral estoppel, the majority essentially determined that those requirements were not met. The majority concluded that unless the Board was certain that the issue decided in the criminal proceeding was identical to the issue before the Board – specifically, whether Mr. Geisen actually knew at the time that the information he provided to the NRC in Serial Letter 2744 was false and misleading – it could not apply

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[190] *Id.* at __ (slip op. at 36-53).

[191] *Id.* at __ (slip op., Dissenting Opinion at 5-7).

[192] *Id.* at __ (slip op., Dissenting Opinion at 19-20).

the doctrine in this proceeding. The majority's decision not to apply collateral estoppel in this instance was not in error.

(1) THE COLLATERAL ESTOPPEL DOCTRINE

As Judge Hawkens stated, the collateral estoppel doctrine "'precludes the re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties or their privies.'"[193] Its use has long been recognized as part of NRC adjudicatory practice.[194] Decades ago, our Appeal Board recognized that our boards may give collateral estoppel effect to issues previously decided in a district court proceeding.[195] The four prerequisites to collateral estoppel are: "'(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated'" in the prior action; (3) there is a valid and final judgment in the prior action; and "'(4) the determination [was] essential to the prior judgment.'"[196] In addition, the party to be prevented from relitigating the issue must have been a party to the prior action; the party seeking to prevent

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[193] *Id.* at __ (slip op., Dissenting Opinion at 2 (quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 561 (1977))).

[194] *See, e.g., Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982).

[195] *Davis-Besse*, ALAB-378, 5 NRC at 562-63.

[196] LBP-09-24, 70 NRC __ (slip op. at 35-36 (quoting *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd*, ALAB-575, 11 NRC 14 (1980))).

relitigation through the application of collateral estoppel need not have been a party.[197]

Mr. Geisen argued before the Board, as he does on appeal, that the first requirement of this test was not met.[198] Resolving that question turns on whether the issues decided regarding Mr. Geisen's participation in preparing and submitting to the NRC Serial Letter 2744 were identical in the criminal and NRC proceedings. Whether collateral estoppel should be applied is a legal question that we review *de novo*.[199]

(2) MAJORITY DECISION TO REJECT COLLATERAL ESTOPPEL

The majority gave three "discretionary" reasons for its decision to reject collateral estoppel, each of which, standing alone, would provide sufficient grounds for doing so, according to the majority.[200] The first – which we find dispositive – is that due to a specific instruction given to the jury in the criminal trial, the criminal conviction may have been based on a standard of "knowledge" different from that used in our proceeding (and in our Enforcement Policy).[201] Coupled with the jury's

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[197] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28, 331-32 (1979).

[198] *See* Geisen Answer at 17-24. He does not contest that the other requirements were satisfied.

[199] *See Watts Bar*, CLI-04-24, 60 NRC at 190.

[200] LBP-09-24, 70 NRC __ (slip op. at 53).

[201] *Id.* at __ (slip op. at 40, 48-50). The majority also found that application of the doctrine, instead of streamlining the proceeding, would actually lead to an additional delay before the enforcement proceeding finally could be resolved. Because Mr. Geisen would remain under an employment ban until that time, the burden of the delay would fall disproportionately on him, the majority observed. *Id.* at __ (slip op. at 37-39). Finally,

general – as opposed to special – verdict, the majority ruled that it could not be certain whether the knowledge standards were the same in both proceedings.

We uphold the majority's decision. Count 4 of the criminal indictment charged that Mr. Geisen "did knowingly and willfully make, use, and cause others to make and use a false writing. . . knowing that it contained the following material statements, which were fraudulent in [enumerated respects]."[202] In its charge to the jury, however, the court included an instruction that a person cannot "avoid responsibility for a crime by deliberately ignoring the obvious,"[203] and that, if Mr. Geisen "deliberately ignored a high probability that the submissions and presentations to the NRC" were false, then the jury could find that Mr. Geisen "knew" they were false.[204] The court advised the jury that conviction on this theory requires that a defendant "deliberately closed his eyes to what was obvious," but that mere "carelessness, or negligence, or foolishness" would not be enough to convict.[205]

Mr. Geisen argued before the Board that this jury charge embraced a "deliberate ignorance" (or

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the majority found that potentially inconsistent jury verdicts undermined the validity of the conviction on Count 4. *Id.* at __ (slip op. at 51-53). We find that we need not consider these final two rationales, because the first provides sufficient grounds for the majority's decision to reject use of the doctrine.

[202] Indictment at 12.

[203] Transcript of Trial, *U.S. v. Geisen*, Docket No. 3:06-CR-712 (N.D. Ohio Oct. 23, 2007) Vol. 13, at unnumbered p. 139 (ML092920145).

[204] *Id.*

[205] *Id.* at unnumbered p. 140.

"willful blindness") theory,[206] which holds that a defendant can be convicted if he was aware that a "high probability" existed of the fact or circumstances that would make his conduct criminal, but ignored that probability so he can disclaim knowledge later.[207] The majority agreed that the instruction to the jury introduced the possibility of a conviction on a deliberate ignorance theory.[208]

The distinction between the court's "deliberate ignorance" standard and the "deliberate misconduct" standard applied in this case is highly significant, indeed, decisive. The Staff, when moving for collateral estoppel, itself conceded that "the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard, and instead would be classified as careless disregard."[209] On appeal, the Staff does not change its position.[210]

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[206] See, e.g., David Geisen's Response to the Board's Questions (Feb. 9, 2009) at 1.

[207] *See, e.g., United States v. Jewell*, 532 F.2d 697, 699 (9th Cir. 1976) (drug smuggling conviction upheld where evidence showed that "although appellant knew of the presence of the secret compartment and had knowledge of facts indicating that it contained marijuana, he deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery"); *United States v. Wasserson*, 418 F.3d 225, 237 -39 (3d Cir. 2005) (unlawful disposal conviction upheld where defendant knew contractor could not lawfully dispose of hazardous waste at the price defendant was paying, but defendant demanded that unsophisticated contractor "assume responsibility" for the waste).

[208] LBP-09-24, 70 NRC __ (slip op. at 40).

[209] Motion for Collateral Estoppel at 23.

[210] *See generally* Staff Petition at 13-14 (focusing instead on its argument that jury convicted Mr. Geisen based on "actual, positive knowledge").

It does not argue that the court's "deliberate ignorance" charge equates to the "deliberate misconduct" standard under our Enforcement Policy.

The majority treated this issue as a discretionary factor weighing against collateral estoppel because it could not be sure on which legal theory the jury convicted Mr. Geisen.[211] In essence, however, the majority found that a key legal requirement for collateral estoppel was not met. If the criminal conviction were in fact based on a standard of knowledge lower than that of our deliberate misconduct standard, then the first requirement of collateral estoppel – that the relevant issue is identical in both proceedings – would not be met. In other words, if the jury convicted Mr. Geisen not because he knew the information in Serial Letter 2744 was false, but because he failed to investigate whether the information in the letter was false, then collateral estoppel could not apply. On the other hand, if the jury convicted Mr. Geisen because they found he *actually knew* the information was false, then the "identity of issues" requirement of collateral estoppel would be satisfied. The majority found, however, that because the jury returned a general verdict of "guilty" on Count 4, the majority could not determine on which theory Mr. Geisen was convicted.

As to this issue, the Staff argues that the majority improperly substituted its determination of fact for that of the jury by finding insufficient evidence of "deliberate ignorance" and actual knowledge.[212] Among other things, the Staff argues that the "questions over the equivalence of the

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[211] LBP-09-24, 70 NRC __ (slip op. at 40).

[212] Staff Petition at 13.

'knowledge' standard" is not the type of consideration that would bar the application of collateral estoppel.[213] We disagree and find that uncertainty resulting from the jury instruction, coupled with the general verdict, was reason enough for the Board to reject use of the doctrine in this case.

The Staff argued before the Board, as it does on appeal, that the Board could look at the evidence presented in the jury trial to determine itself on which theory the jury based its conviction.[214] The majority regarded the Staff's argument as an invitation for the Board to examine the evidence presented at the criminal trial and make a judgment as to which theory the jury used to convict Mr. Geisen.[215] But, as the majority observed, "[p]erforming such a duplicative examination is precisely what application of collateral estoppel is intended to prevent. If we must re-examine the issue one way or another, it makes more sense to do it on the evidence presented to us than on the evidence presented elsewhere."[216]

As our Appeal Board once cautioned, in determining whether to apply collateral estoppel, a board should not look into the jury trial to determine whether the verdict was "correct."[217] Issues not

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[213] *Id.* at 12-13.

[214] Motion for Collateral Estoppel at 3, 11-12. *See also* Staff Petition at 14.

[215] *See* LBP-09-24, 70 NRC __ (slip op. at 48-50).

[216] *Id.* at __ (slip op. at 50).

[217] *Davis-Besse*, ALAB-378, 5 NRC at 562-63. *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC 169, 182 (2002) ("The correctness of the prior decision is not . . . a public policy factor

decided by special verdict are difficult to decipher for collateral estoppel purposes because of the uncertainty whether the precise issue was "actually determined" in the prior criminal case.[218] This uncertainty is reason enough to find that the issue decided by the general verdict should not be accorded preclusive effect.[219]

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upon which the application of the doctrine of collateral estoppel depends.").

[218] *Cf. Bd. of County Supervisors v. Scottish & York Ins. Servs.*, 763 F.2d 176, 179 (4th Cir. 1985) ("We cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict.").

[219] Nothing in the recent decision by the U.S. Court of Appeals for the Sixth Circuit affirming Mr. Geisen's conviction resolves the uncertainty. Notwithstanding the Sixth Circuit's decision, it remains unclear whether the jury (in issuing its general verdict) and the Licensing Board (in assessing the enforcement action) applied the same standard of knowledge. The Sixth Circuit's holding that the jury *could* have convicted Mr. Geisen under *either* a "deliberate ignorance" *or* an "actual knowledge" theory does not tell us what the jury *actually* found – the court's decision, therefore, does not resolve the Board majority's fundamental uncertainty. *United States v. Geisen*, 2010 WL 2774237 at *12-14, *16-18. The Sixth Circuit's affirmance of a jury verdict against Mr. Geisen – which may well have rested on a deliberate ignorance theory inapplicable [] in our proceeding – does not require setting aside our own Board's record-based factual findings.

It may seem counterintuitive for us to uphold a Board decision in favor of Mr. Geisen on essentially the same facts the Sixth Circuit found sufficient to convict him, particularly because our civil proceeding is governed by a preponderance-of-the-evidence standard, whereas the criminal case before the Sixth Circuit was governed by the stricter beyond-a-reasonable-doubt standard. Even so, these seemingly contradictory results do not justify applying collateral estoppel in this instance. The Board majority reasonably found itself unsure of the precise ground for the jury verdict, and thus declined to apply collateral

The Staff also argues that the majority erroneously assumed that the jury "failed to follow the district court's instructions" in delivering the guilty verdict.[220] It is true that at two separate points in its discussion on the matter, the majority speculates that the jury may have been misled by the "deliberate ignorance" instruction to convict on a lesser finding of negligence.[221] But it does not appear to us that the majority *assumed* that the jury did so. The majority rejected collateral estoppel because a proper finding of guilt based on deliberate ignorance – in strict compliance with the jury instruction – would not equate to deliberate misconduct under our Enforcement Policy.[222] Coupled with the Staff's consistent position that "deliberate ignorance" is not the equivalent of deliberate misconduct in our enforcement proceedings, the majority found that the jury may have convicted Mr. Geisen on a theory that is not the same as that required to establish liability in our enforcement actions.

Responding to an argument made by Judge Hawkens that deliberate ignorance would satisfy our

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estoppel. The Board held its own evidentiary hearing, developed its own record, and made its own fact findings – the Board majority, unlike the dissent, found Mr. Geisen's version of events credible. We cannot say that the Board decision not to apply the collateral estoppel doctrine here was unreasonable based on an after-the-fact appellate decision whose precise footing remains uncertain. In any case, the nature of this proceeding has generated interest in further exploring the standard of knowledge required for pursuing violations against individuals for deliberate misconduct. Therefore, outside of this adjudication, we intend to direct the Staff to analyze this issue.

[220] Staff Petition at 13-14.

[221] *See* LBP-09-24, 70 NRC __ (slip op. at 46, 49).

[222] *See id.* at __ (slip op. at 49).

Enforcement Policy,[223] the majority stated that because the Staff had steadfastly "disavowed" this position before and throughout the hearing, it would be unfair for the Board to alter the theory of the Staff's case.[224] Mr. Geisen had tailored his presentations to counter the Staff's case as prosecuted, the majority reasoned. Indeed, the Staff does not argue on appeal that "deliberate ignorance" is equivalent to "deliberate misconduct" under our Enforcement Policy. In our view, the majority's determination was reasonable.

The majority mentioned two additional reasons supporting its decision not to apply collateral estoppel. First, the majority found that the delay caused by Mr. Geisen's appeal of his criminal conviction, which was still pending at the time, served as a second discretionary reason not to apply collateral estoppel in this particular enforcement action.[225] In addition, the majority articulated its

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[223] Judge Hawkens concluded in his Dissenting Opinion that, despite any Staff concessions to the contrary, deliberate ignorance is a standard of knowledge that satisfies our Enforcement Policy. *See id.* at __ (slip op., Dissenting Opinion at 10-16). Therefore, he found that the elements of collateral estoppel were met regardless of the jury's theory. Further, he concluded that the possibility that the jury's verdict was grounded on this theory provides no discretionary basis against applying the doctrine. *Id.* at __ (slip op., Dissenting Opinion at 20). Rather, Judge Hawkens took the position that the Board should disregard the Staff's concession that deliberate ignorance would not satisfy our Enforcement Policy. He reasoned that a "surpassing public interest favors applying collateral estoppel, and no countervailing interest militates against its application." *Id.*

[224] *See id.* at __ (slip op. at 43). *See also id.* at __ (slip op. at 42 nn.76-77).

[225] *Id.* at __ (slip op. at 37-39).

concern that the validity of the jury's verdict was undermined by a potential inconsistency.[226] We need address neither of these factors, as we find that the potentially differing standards of "knowledge" in the criminal and civil proceedings was a dispositive basis for declining to accord preclusive effect to the jury verdict on Count 4.

III. CONCLUSION

For the reasons discussed above, we *grant* the Staff's petition for review, and *affirm* the majority's decision in LBP-09-24.[227]

IT IS SO ORDERED.

For the Commission

[NRC Seal]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of August, 2010.

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[226] *Id.* at __ (slip op. at 51-53). Although Mr. Geisen was convicted on Count 4, the jury acquitted him of Count 5, which involved Serial Letter 2745 – a communication submitted to the NRC two days after Serial Letter 2744 containing similar misrepresentations. *See* Indictment at 14.

[227] Given that today's decision affirms the Board majority's decision to set aside the Enforcement Order, we need not address the Staff's final argument on appeal as to whether the majority correctly assessed the Staff's application of Factor 7 of the sanction determination process in our Enforcement Policy.

Chairman Jaczko, respectfully concurring in part and dissenting in part:

I join with my colleagues in large part on this Order. I differ only in that I was more persuaded by the dissent's analysis of the collateral estoppel issue. But as the Commission's Order points out, the collateral estoppel issue would have only resolved one of the bases for the enforcement order in this case, and thus would not have eliminated the need for the hearing in its entirety. Mr. Geisen was subject to the enforcement order for almost four years. Even if collateral estoppel applied and resolved the single count at issue, the majority of the Board did not uphold the remaining violations. Therefore, whatever the ultimate penalty for that single count, Mr. Geisen was already subject to it. Thus, I believe the issue is effectively moot. The larger issue is the lack of clarity surrounding our standard of knowledge. The Commission has made it clear that its ruling here applies only in this instance, and we intend to request the staff to review this larger issue outside of this adjudication. I look forward to further review of this issue at that time.

APPENDIX D

No. 08-3655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	ORDER
Plaintiff-Appellee,	)	
v.	)	
DAVID GEISEN	)	
	)	[Entered: Sept. 2, 2010]
Defendant-Appellant.	)	

BEFORE: MERRITT, GIBBONS, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/

Leonard Green, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-3655

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

DAVID GEISEN,
Defendant - Appellant.

FILED
Jul 15, 2010
LEONARD GREEN, Clerk

Before: MERRITT, GIBBONS, and ROGERS,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Toledo.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/

Leonard Green, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
Northern District of Ohio

FILED
2008 MAY -2 PM 1:08
CLERK U.S.
DISTRICT COURT
NORTHERN
DISTRICT OF OHIO
TOLEDO

UNITED STATES OF AMERICA,
v.
David Geisen

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:06cr712-01**
USM Number: 43520-060
Richard Hibey & Andrew Wise
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): _____.
[ ] pleaded nolo contendere to counts(s} ___ which was accepted by the court.
[X] was found guilty on count(s) 1,3 & 4 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1001 & 2	False Statements, aiding and abetting	2/16/2002	1
18 USC 1001 & 2	False Statements, aiding and abetting	10/30/2001	3 & 4

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on counts(s) 2 & 5 of the Indictment .

[ ] Count(s) ___ (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in the defendant's economic circumstances

May 1, 2008
Date of Imposition of Judgment

s/
Signature of Judicial Officer

DAVID A. KATZ United States Senior Judge
Name & Title of Judicial Officer

May 2, 2008
Date

PROBATION

The defendant is hereby sentenced to probation for a term of three years on each of Counts 1,3 and 4 to run concurrently. The defendant shall report to the U.S. Probation Office in the Eastern District of Wisconsin within 72 hours.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the Court.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

[X] The defendant shall not possess a firearm, ammunition, destructive device or any other dangerous weapon.

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted

of a felony unless granted permiSSion to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF PROBATION

The defendant shall provide the probation officer access to all requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.

The defendant shall participate in the Home Confinement Program with Electronic Monitoring

for a period of 4 months, to commence no later than 30 calendar days from sentencing. The defendant shall be required to remain in his/her residence unless given permission in advance by the probation officer to be elsewhere. The defendant may leave his/her residence to work or for work related travel and receive medical treatment and to attend religious services, as approved by the Probation Officer. The defendant shall wear an electronic monitoring device, follow electronic monitoring procedures and submit to random drug/alcohol tests as specified by the probation officer. The defendant may participate in the Earned Leave Program under terms set by the probation officer. The defendant is required to pay the costs associated with the Home Confinement Program. Payment is to be made as directed by the Supervising Home Confinement Officer.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

The defendant shall perform 200 hours of community service at the direction of the probation officer.

The defendant shall pay a fine in full immediately in the amount of $7,500.00 ($2,500.00 for each count) through the Clerk of the U.S. District Court. Should the defendant be unable to pay in full immediately, the balance shall be paid at the minimum rate of 5% of the defendant's gross monthly income. If not paid

in full during the term of probation, the balance becomes the obligation of the Office of the U.S. Attorney financial litigation unit for collection.

The defendant shall be barred from employment with the Nuclear Power Industry during the term of his probation.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 300.00	$ 7,500.00	$

[ ] The determination of restitution is deferred until_. An amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

[ ] The defendant must make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	*Total Loss	Restitution Ordered	Priority or Percentage
TOTALS:	$___	$___	

[ ] Restitution amount ordered pursuant to plea agreement $_____

[ ] The defendant must pay interest on restitution and a fine of more than $2500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [] fine [] restitution.

[ ] The interest requirement for the [] fine [] restitution is modified as follows:

Findings for the total amount of losses are required under Chapters 109A, 110, 11OA, and 113A of Title 18 for offenses committed on or after September 13,1994 but before April 23. 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than or
[ ] in accordance with [ ] C, [ ] D, [ ] E, or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C [ ] D, or [ ] F below); or

C [ ] Payment in equal installments of $ over a period of , to commence days after the date of this judgment; or

D [ ] Payment in equal installments of $ over a period of , to commence days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [X] Special instructions regarding the payment of criminal monetary penalties:

[X] A special assessment of $300.00 is due in full immediately as to count(s) 1,3 & 4. PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT

[ ] After the defendant is release from imprisonment, and within 30 days of the commencement of the term of supervised release, the probation officer shall recommend a revised payment schedule to the Court to satisfy any unpaid balance of the restitution. The Court will enter an order establishing a schedule of payments.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several (Defendant name, Case Number, Total Amount, Joint and Several Amount and corresponding payee):

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest; (4) fine principal; (5) fine interest; (6) community restitution; (7) penalties; and (8) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Docket No. 3:06-CR-712
Plaintiff,	)	Toledo, Ohio
	)	October 23, 2007
v.	)	Trial
DAVID GEISEN, et al .,	)	
Defendant.	)	

VOLUME 13 OF 15
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DAVID A. KATZ
UNITED STATES DISTRICT JUDGE.

Appearances: [omitted for printing]

Tracy L. Spore, RMR, CRR
Court Reporter

THE COURT: So this will continue, but where applicable the changes on 15 will be incorporated into 17.

MR. POOLE: Specifically the knowingly and willfully?

THE COURT: Exactly.

Page 18, I agree that the language, proving the defendant's state of mind, could be better said, and I think the word is "determine." And so in the first sentence of page 18, as well as the first sentence of the second -- well, it's the third paragraph, the word "proving" will be changed to "determining", and the word "proved" in the third sentence, first line, will be changed to "determined".

Anything else on page 18?

MR. WISE: No.

THE COURT: The defendant objects to page 19 in totality, and you have already stated your objections in writing.

The government has indicated in the third paragraph on page 1 of their memorandum they would like a deliberate ignorance instruction.

MR. POOLE: Well, Your Honor, we believe there's a basis for a deliberate ignorance instruction here, a factual basis in the proof of the trial: Mr. Cook's repeating he thought paragraph 1D was about future inspections in the face of its clear language and the understanding of everybody else involved; Mr. Geisen's failure to recall the numerous warning e-mails he received. I think that there is, as to both defendants, a factual basis for arguing and for an instruction that they deliberately avoided facts which lent to creating a high probability that

the submissions and presentations to the NRC concealed material facts and included false statements. I would suggest that in the blanks there be a deliberate ignorance instruction. I can give it back to you again, but we think the blanks ought to be filled in with language similar to what I've just used.

So reading it again slowly, that the submissions and presentations to the NRC concealed material facts or included false statements. We would use that language to fill in the blanks and we think it's the appropriate instruction.

THE COURT: And you would include that for both defendants?

MR. POOLE: Yes, Your Honor.

MR. WISE: Judge, if I can, I think that that argument misses what deliberate ignorance is about, and I think it points out why this instruction is so dangerous. Deliberate ignorance or willful blindness is appropriate in a case where there is evidence, affirmative evidence of action, by the defendant to avoid gaining knowledge. And, I mean, I think -- well, the examples would be if somebody testified that I took something to Mr. Geisen to show him the information about the past inspections, and he said, I don't want to see that. It's based on action. That's the point that these courts have been making when they were talking about how dangerous it is to give this instruction and slide the statement into negligence.

When Mr. Poole says Mr. Geisen's resorted to saying that he didn't remember these warning e-mails, the government's alleging that he had the

knowledge through these e-mails, and it's their allegation that he had the knowledge and then made what he knew were statements in contravention of that knowledge that makes it a false statements offense. Deliberate ignorance is -- and I think the cases that we've cited have recognized this -- is a theory of criminal liability inconsistent with actual knowledge.

Either you knew it, in which case the instruction is actual knowledge; or you made steps to not gain that knowledge. And there's no evidence of taking steps not to gain that knowledge. There may be evidence that e-mails were sent and that the defendants, you know -- we will certainly argue that this is a situation where there's no evidence that he drew from it what the government now says he should have drawn from it. But there's no evidence that either of these gentlemen avoided, purposely avoided, deliberately avoided gaining the knowledge. That's why the instruction is either called deliberate ignorance or willful blindness.

There has to be an act by which you shield yourself from gaining the knowledge that will make you liable.

I think as this is given it is very dangerous because it suggests, in essence, that they could convict on a negligence standard, and that's certainly at odds with the law.

THE COURT: As a matter of fact, it negates carelessness, negligence, or foolishness.

MR. WISE: The way this is going to be argued is to say that these gentlemen should have known. Mr. Geisen specifically got these, quote-unquote, warning e-mails and should have known the

significance of these things going into September, 2001. If that is what the jury thinks, he is not guilty. And this instruction suggests otherwise, and that's inappropriate.

THE COURT: In the Sixth Circuit, this is a pattern instruction, and the cases have uniformly held that to give this pattern instruction, even if error, is harmless error. The question is, in reviewing the multiplicity of issues presented to the jury, in my mind, is there sufficient basis upon which to give this instruction?

MR. WISE: Your Honor, if I could interrupt you.

THE COURT: Please don't. Keep the thought.

All right, Mr. Wise, please complete your thought.

MR. WISE: I just wanted to call the Court's attention to the second column of the case that I handed up this morning, which was the opinion that we cited in the memo last week. This is the Ramos case. It is an unpublished opinion. I think if you look at the second column on page 3, this is the Sixth Circuit dealing with exactly the same issue that you dealt with before, and the Court is right, the Sixth Circuit recognized that giving the instruction where there's sufficient proof of actual knowledge renders the giving of a deliberate blindness or deliberate ignorance instruction as harmless error, but goes on to say it is error to give that instruction in a situation where the theory of liability is actual knowledge, which it clearly is here.

THE COURT: I'm concerned about the theory of the case and the theory of the statute and their

intermeshing. It would appear to me the entire thrust of this case had to be or was -- I'm sorry, was that Messrs. Geisen and Cook had knowledge of the incomplete nature of the inspections due to the inability to make a complete inspection because of the presence of boric acid deposits on the head of the reactor. If that is the case, then I don't believe it's deliberate indifference it's actual knowledge and failure to disclose. And I don't see how a deliberate indifference charge -- they may have been deliberately indifferent to their responsibilities, but that's not what the deliberate indifference charge is to reflect.

If my summation, if you will, of the totality of evidence was as I've just done it, how can deliberate indifference be a part of it?

MR. POOLE: Well, our belief is that while your characterization of the government's case is generally accurate, I could gild the lily, but generally accurate, we think it's the defenses that these defendants raised on the stand that make deliberate ignorance relevant.

THE COURT: How is it deliberate ignorance to say on the stand, I didn't know. That's not deliberate ignorance. Deliberate ignorance is in a 2004 case, Shabazz, which says -- in that case the agent testified that the defendant admitted she assisted her mother in completing annual accounting reports required by the Veteran's Administration showing the necessity for disability benefits because -- expended for her brother's care and board when, in fact, she knew that the brother was incarcerated. Here we don't have that. That's deliberate indifference. It seems to me that at most they -- you

could argue that they were deliberately indifferent to their responsibilities, but that's not deliberate ignorance of the facts. It's the deliberate failure to disclose, and that's not ignorance. I mean, I think it's a non-sequitur here. I just don't see it.

MR. POOLE: Let me just explain how we see it. I'm referring now to the unpublished case that Counsel produced.

THE COURT: The Marry case?

MR. POOLE: Ramos.

THE COURT: The Marry case is the underlying case in the '90s which gave rise to these later cases.

MR. POOLE: Look at page 3, reading from the Beginning of the paragraph: The deliberate ignorance charge is appropriate where evidence shows the defendant attempted to escape conviction by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct.

Here we would say, for example, the offense is concealment of material fact or making a false statement. We believe Mr. Cook closed his eyes to the obvious risk that he was drafting pleadings that concealed material facts and that contained false statements. Now, what's the evidence that he deliberately closed his eyes? Well, his own testimony that he thought -- implausibly that he thought that that question was about future inspections. He's avoiding the knowledge that, in fact, that submission concealed material facts about impediments to inspection, about problems of past inspection, about failure to comply with Boric Acid Corrosion Control,

with this conclusion in writing about future inspections.

THE COURT: I'm with you until you had said the known risks. It's not the risks which are on trial here. It is the statements which are alleged to be false or misleading, not the risks that the omitted material could create. Am I correct?

MR. POOLE: This language about risk, I'm echoing the language in the case. So the language in the case says the failure -- that the defendant attempted to escape conviction by deliberately closing his eyes to the risk he was committing a violation. We think that's just what he did.

THE COURT: I want to think about it. I want to point out to all parties the footnote or the use note, as it's called, of the pattern instruction, 2.09 in the Sixth Circuit pattern jury instructions, quote, "This instruction should be used only when there is some evidence of deliberate ignorance."

MR. POOLE: We know it well.

THE COURT: I'll request that you tear out one of your pages and complete those blanks on page 19 and I will, during our break, make a determination of how we will treat it, and then whoever is the loser on page 19 will have a right to object.

MR. POOLE: Thank you, Your Honor.

THE COURT: Page 20? Page 21? Off the record.

(Discussion had off the record.)

THE COURT: Page 21? Page 22 comes out. Page 23? Page 24? Page 25? Page 26? And page 27 other than the verdict form itself?

MR. BALLANTINE: Your Honor, I believe there may be a pattern instruction when defendants do testify. Do you intend to give that? I don't have it right in front of me.

THE COURT: I do. 702-B reads as follows: You have heard the defendant testify. Earlier I talked to you

* * *

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No. 10-720

Supreme Court, U.S
FILED
MAR 4 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

DAVID GEISEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on a deliberate-ignorance theory of knowledge based on evidence that petitioner knew there was a high probability that information he submitted to the Nuclear Regulatory Commission contained false statements or concealed material facts.

2. Whether the district court erred in finding that any error in giving a deliberate-ignorance instruction would have been harmless because there was sufficient evidence to establish that petitioner had actual knowledge of falsehoods and material concealment.

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In the Supreme Court of the United States

No. 10-720

DAVID GEISEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 612 F.3d 447. The opinion of the district court denying petitioner's motion for judgment of acquittal or new trial (Pet. App. 61a-64a) is unreported

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2010, and a petition for rehearing was denied on September 2, 2010 (Pet. App. 139a-140a). The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was

convicted on three counts of knowingly and willfully concealing material information and making false statements to the Nuclear Regulatory Commission (NRC), in violation of 18 U.S.C. 1001 and 2. Pet. App. 2a. The district court sentenced petitioner to probation and imposed a fine of $7500. *Id.* at 144a-149a. The court of appeals affirmed. *Id.* at 1a-60a.

1. NRC regulates nuclear power plants pursuant to the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* All plants must be licensed by NRC and must operate in accordance with license conditions. 42 U.S.C. 2131; 10 C.F.R. 50.10(b); see also 42 U.S.C. 2133 (commercial licenses). The regulations implementing the Atomic Energy Act require all licensees to "submit * * * written statements, signed under oath or affirmation," whenever NRC requests information to determine whether a license should be modified, suspended, or revoked. 10 C.F.R. 50.54(f). In addition, all "[i]nformation provided to the Commission * * * by a licensee * * * shall be complete and accurate in all material respects." 10 C.F.R. 50.9(a).

2. This case arises out of events that occurred in 2001 and 2002 at the Davis-Besse Nuclear Power Station (Davis-Besse) near Toledo, Ohio. Pet. App. 3a. In response to a safety incident at a similar plant, NRC required inspections at all plants by the end of 2001. *Ibid.* The operator of the Davis-Besse plant successfully petitioned NRC to postpone such an inspection until a planned refueling shutdown in the Spring of 2002. *Ibid.* When the inspection did take place, Davis-Besse found five cracked nozzles and a significant cavity caused by erosion in the head of the nuclear reactor. *Ibid.* Petitioner and two other employees at the plant were indicted for providing false statements and concealing

material facts in connection with the plant's successful petition to postpone inspection. *Ibid.*

a. Davis-Besse is a two-loop pressurized water reactor. Pet. App. 4a; C.A. App. 813, 839. Uranium-235 rods at the core of the reactor vessel fuel a nuclear reaction that heats "coolant water" in a "primary loop," which transfers heat to a "secondary" water-to-steam loop that drives turbines to generate electricity. Pet. App. 4a; Tr. 521-531; C.A. App. 812. The coolant is conditioned with boric acid to regulate the nuclear reaction and is pressurized to approximately 2000 pounds per square inch. *Ibid.* At the top of the reactor vessel is a domed carbon-steel lid or "head" that is approximately ten feet in diameter and six inches thick. C.A. App. 839, 841. Sixty-nine nozzles (tubes four inches in diameter and several feet long) penetrate the head. Pet. App. 4a; C.A. App. 839, 841. The nozzles and drive mechanisms above the reactor head enable operators to lower control rods into the reactor vessel to control the nuclear reaction. Pet. App. 4a; Tr. 527-529.

b. In the early 1990s, the nuclear power industry discovered that the vessel-head nozzles on pressurized water reactors are susceptible to "stress corrosion cracking." Tr. 111-112; Pet. App. 8a. When such stress corrosion cracking occurred, it initially appeared as small axial cracks that were not considered an imminent safety threat. Tr. 111-113, 536, 540-541; Pet. App. 8a. The NRC believed that the cracks would be identified by substantial visible evidence of leakage before they would pose a threat to the structural integrity of a reactor. Tr. 536; Pet. App. 8a-9a. When pressurized coolant escapes from a reactor or contacts the extremely hot vessel head within the reactor, the coolant water tends to flash to

steam, leaving behind telltale boric-acid deposits and limiting any corrosion. Tr. 239, 536; Pet. App. 9a.

In early 2001, however, operators of the Oconee Nuclear Station in South Carolina discovered circumferential cracking on several nozzles, including a large through-wall crack that extended 165 degrees around one nozzle, above the nozzle's underside weld and within the vessel head's "pressure boundary." Tr. 242-247; C.A. App. 246-248; Pet. App. 8a-10a. A nozzle thus weakened is at risk of being "physically blow[n]" out of the reactor head, Tr. 114-115, which would produce a sudden rupture of the pressure boundary and rapid release of coolant, Tr. 289-292. See C.A. App. 251; Pet. App. 8a-10a. Such a "loss of coolant accident" would threaten damage to the core of the reactor. Tr. 291-293. Further, Oconee operators observed only a small "popcorn" like boric acid deposit—less than one cubic inch in size—at the surface where the affected nozzle penetrated the vessel head. C.A. App. 247, 251; Tr. 242. Those observations belied expectations that significant leaks and large deposits on the topside of the vessel head would precede any serious cracking underneath. C.A. App. 251.

In response to this newly discovered risk, NRC issued a bulletin alert on August 3, 2001 (NRC Bulletin 2001-01), requiring affected plant licensees to provide detailed information about susceptibility to cracking and previous inspections, including a "description of * * * nozzle and * * * head inspections * * * performed * * * in the past 4 years," and "a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the * * * head for visual examinations." C.A. App. 246-261; Pet. App. 10a-11a. The Bulletin advised that plants (including Davis-Besse)

with a "high susceptibility" to stress cracking "need[ed] to use a qualified visual examination of 100% of the * * * nozzles" and that "the effectiveness of [such] examination should not be compromised by the presence of insulation, existing deposits on the [reactor vessel] head, or other factors that could interfere with the detection of leakage." C.A. App. 253. The Bulletin further directed that any licensee that did not intend to shut down for inspection before December 31, 2001, must submit a "basis for concluding" that its plant could safely operate in accordance with regulatory requirements prohibiting "cracked and leaking * * * nozzles" until the next scheduled outage. *Id.* at 254-256.

Davis-Besse, like all pressurized water reactors, was subject to the requirements in the NRC Bulletin. C.A. App. 388; Pet. App. 10a-11a. Davis-Besse sought permission to maintain operations until the next scheduled shut-down in April 2002 rather than shutting down for a complete inspection by the end of 2001. Pet. App. 10a. Davis-Besse was required to provide information demonstrating that it could continue to operate safely, including descriptions of nozzle and vessel head inspections that had been performed, any conclusions resulting therefrom, and a description of any limitations to accessibility of the vessel head. *Id.* at 11a. Regulations governing the nuclear industry required that Davis-Besse respond to the NRC Bulletin with "written statements, signed under oath or affirmation," and that all information provided to NRC "be complete and accurate in all material respects." *Id.* at 11a-12a (citing 10 C.F.R. 50.54(f), 50.9(a); 42 U.S.C. 2011 *et seq.*). Between September 4 and November 30, 2001, Davis-Besse operators submitted a series of letters to NRC containing the information requested in the Bulletin. Several conference

calls and meetings also took place between Davis-Besse employees and NRC between September 4 and December 4, 2001. This case concerns false statements and material omissions made in those letters and meetings.

3. a. At the time of the NRC Bulletin, Davis-Besse operators lacked critical information about the condition of the plant's nozzles for two reasons. First, due to plant design, physical access to the surface of the vessel head and nozzle penetrations was severely restricted. Tr. 837. At all times relevant to this case, the only access to the surface of the vessel head was through 18 approximately five-by-seven inch rectangular "weep holes" at the bottom of the service structure. Tr. 543, 927. In order to visibly inspect the vessel head and nozzle penetrations, therefore, Davis-Besse personnel had to insert pole-mounted video cameras through the weep holes. Tr. 881. Given the small size of the weep holes, the length of the poles, the curvature of the head, the distance to the top of the head, and the limited space between the insulation and the top of the head, a substantial portion of the head was inaccessible for inspection or cleaning. Tr. 612, 928-29, 944-45, 1179-1180; C.A. App. 201, 823.

Second, during biannual refueling outages in 1996, 1998, and 2000, Davis-Besse personnel observed increasing boric acid deposits on the vessel head. Davis-Besse operators attributed those deposits to leaks from faulty gaskets on "control rod drive mechanism" (CRDM) flanges above the insulation, rather than to cracked nozzles. C.A. App. 614, 618; Tr. 1202-1203. Whatever their source, the deposits blanketed substantial areas of the vessel head, preventing inspection for popcorn-like deposits at nozzle penetrations such as those that had been observed at the Oconee plant in South Carolina. Tr. 248.

Significantly, during the 2000 refueling outage, Davis-Besse personnel encountered rust-stained boric acid formations that flowed like lava from several weep holes, completely blocking access for inspection through those holes. C.A. App. 632, 817; Tr. 179-180. During cleaning efforts, the plant was forced to use pressurized hot water to loosen deposits and "spud" bars to break up chunks that could not fit through the weep holes. Tr. 175-178.

At trial, the government introduced Davis-Besse's inspection videos from 1996, 1998, and 2000, as well as a report on their content. Tr. 517, 542-553, 658-659. Of the 69 nozzles on the reactor head, the 1996 video showed only 51, the 1998 video showed only 43, and the 2000 video showed only 23. Tr. 551; C.A. App. 803-810. Due to incomplete camera views and boric acid deposits masking nozzle penetrations, the total number of nozzles that could be verified to be free of popcorn-like deposits from the video evidence was only 28 in 1996, 18 in 1998, and five in 2000. Tr. 551-552; C.A. App. 803-810.

b. In 1998, petitioner began working at Davis-Besse. Tr. 1820. In 1996, he became a senior reactor operator. Tr. 1821. In March 2000, he became the Design Basis Engineering Manager, with responsibility over issues relating to reactor design. Tr. 1823-1826. Petitioner supervised the 2000 refueling outage and observed photos of boric acid flowing from service-structure weep holes. Tr. 1831-1832. On April 27, 2000, petitioner reviewed a "condition report" describing the "lava-like" flows of boric acid encountered during the 2000 refueling outage, and authorized removal of the restraint on returning to operation that had been prompted by that report. C.A. App. 636, 831. In September 2000, petitioner participated in a management decision to defer

action, for financial reasons, on a plan to cut access doors into the service structure to correct the design flaw that prevented access to the vessel head and nozzles for inspection and cleaning. Tr. 930-969, 1953-1955; C.A. App. 639, 644, 823.

Shortly thereafter, petitioner learned of the Oconee findings. Tr. 1501, 1504, 1836-1837. On June 27, 2001, petitioner executed a decision memo addressing those findings and concluding that vessel head and nozzle inspection at Davis-Besse could be "deferred" until the next refueling outage, scheduled for April 2002. C.A. App. 232-239. The memo observed that "[l]arge boron leakage from a CRDM flange" had prevented "detailed inspection of" the nozzles during the previous outage, *id.* at 233, 237, but concluded that delaying inspection until April 2002 did not carry a risk of "catastrophic failure" because Davis-Besse's nozzles were 2.5 operational years behind Oconee's in terms of use and expected degradation, *id.* at 234, 238. Approximately one month later, the NRC issued its Bulletin emphasizing the "need" for a "a qualified visual examination of 100% of the * * * nozzles." *Id.* at 253.

c. Petitioner and a team of others prepared and reviewed Davis-Besse's response to the NRC Bulletin, which was submitted on September 4, 2001. C.A. App. 383-410. At trial, petitioner testified that he did not draft the document, but went through the "pertinent sections that deal with the design of the plant" to "make sure that they sounded right." Tr. 1861, 1905. On the question of design impediments to inspection, the letter falsely stated that the insulation structure "does not impede a qualified visual inspection" and "does not interfere with the visual inspection." C.A. App. 389. As to recent inspections, the letter reported only "some accu-

mulation of boric acid deposits * * * beneath * * * leaking flanges," and did not disclose the "large boron leakage" and "lava-like" flows encountered the previous year. *Id.* at 389-390. The letter concluded that Davis-Besse need not shut down for inspection before its next scheduled refueling outage because: (1) Davis-Besse was "similar in design" to Oconee, (2) Oconee had "demonstrated an ability to identify leaking CRDM nozzles by visual inspection," and (3) Davis-Besse's 1998 and 2000 video inspections revealed no "indications * * * similar to [those] seen at [Oconee]." *Id.* at 390, 392-394.

d. Upon review, the NRC found this response to be incomplete and confusing, especially as to the extent of prior inspections. Tr. 122, 233-234. On September 28, 2001, the NRC advised Davis-Besse that the plant would face a shutdown order in December if the plant was unable to provide a "better justification" for continuing to operate. Tr. 123. Because a shutdown before completion of the fuel cycle would have had a negative impact on operational costs and employee morale, Davis-Besse managers scrambled to avoid it. Tr. 1222-1225, 1515.

During an October 3, 2001, conference call with NRC staff, petitioner provided Davis-Besse's initial answer on the actual number of nozzles previously inspected, falsely asserting that the inspections covered "100 percent" of the head, with only four or five nozzles impeded by boric acid deposits from flange leaks. Tr. 246-247, 393-395, 1227-1229; C.A. App. 656. Sometime thereafter, petitioner directed co-defendant and reactor coolant systems engineer Andrew Siemaszko, to prepare a table reporting nozzle-by-nozzle inspection results. Tr. 1515-1516. Petitioner told NRC investigators that he viewed inspection video images at Siemaszko's desk and was responsible for Siemaszko's work. Tr. 1516-1517,

1522-1523. Petitioner also told a company investigator that he reviewed inspection videos "while preparing for the NRC interactions in August, 2001." C.A. App. 831; Tr. 482, 505-507. On October 11, 2001, petitioner and other Davis-Besse managers traveled to NRC headquarters in Rockville, Maryland, to brief NRC staff. Tr. 249-251; C.A. App. 660-681. Petitioner prepared and presented an exhibit that falsely reported that Davis-Besse had "verified" all nozzle penetrations "to be free from 'popcorn' type boron deposits using video recordings from" 1998 and 2000. Tr. 1236, 1916; C.A. App. 667, 678.

On October 17, 2001, petitioner and others approved a supplemental response to the Bulletin containing Siemaszko's table reporting nozzle-by-nozzle inspection results. C.A. App. 414-425. In contrast to the October 11 briefing, the October 17 letter reported that Davis-Besse had not viewed all nozzles in 1998 and 2000, because some nozzles were "obscured by boric acid crystal deposits." *Id.* at 421. The letter falsely added, however, that the "the entire [vessel] head was inspected" in 1996, that the 1996 inspection included "65 of 69 nozzles,"—*i.e.*, all nozzles that Davis-Besse believed to qualify for visual inspection—and that the inspections revealed no indications of leaking nozzles. *Id.* at 420-421, 425. With respect to the 1996 inspection, the table contained no nozzle-specific results, but instead contained a footnote stating that the "entire" head was viewed, but that "specific nozzle view[s]" could not be correlated by nozzle number, because the video was "void of head orientation narration." *Id.* at 424-425. At trial, the government played portions of the 1996 video, which did include audio head-orientation narration—narration NRC used to

correlate nozzle views and determine that all nozzles were not depicted. Tr. 658-659.

Based on the false report of a whole-head inspection in 1996, the letter postulated that the "earliest" a crack could have begun to develop was May 1996, after the inspection. Tr. 658-659. Citing analysis indicating that it would take at least 7.5 years for a through-wall circumferential crack to grow beyond an "allowable" size, the letter concluded that Davis-Besse could safely operate through at least 2003, precluding the need for an inspection before the refueling outage scheduled for April 2002. C.A. App. 421-422. In a follow-up meeting with the NRC on October 24, 2001, petitioner again falsely reported that "the inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996" and that "no head penetration leakage was identified." *Id.* at 682-707; Tr. 1247-1250.

Petitioner subsequently reviewed and approved three additional supplemental responses, each reiterating the false reports on the scope and quality of the video inspections. C.A. App. 527-611, 708-710, 712-729. One submission was designed to provide representative images from the three video inspections, *id.* at 559-608, but excluded the most damaging images, as well as the 2000 photos showing rust-colored lava-like flows emanating from the weep holes, Tr. 276-284. Petitioner testified that he created the photo captions for the report. Tr. 1519-1521. A caption depicting boric-acid deposits in 1996 describes the deposits as being "in the vicinity of previous leaking flanges" and "verified to not be active or wet." C.A. App. 570. Petitioner attributed this information to an employee who had inspected the flanges above the mirror insulation, not the reactor head below. Tr. 1428-1442, 1519, 1521. The employee who performed

the 1996 vessel head inspection testified that the inspection was incomplete and that he had told others so. Tr. 1092. Both employees testified that nobody at Davis-Besse asked them about the images or photo captions submitted to NRC. Tr. 1157, 1445.

On the evening of November 8, 2001—in advance of another NRC meeting—petitioner met with NRC staff to show parts of the inspection videos. Tr. 281-282, 300-304, 332. Petitioner played portions of the 1996 and 1998 videos. Tr. 303-304. An NRC investigator testified that he learned "in retrospect," after viewing the videos as part of the NRC investigation, that petitioner had shown only the "good portions." Tr. 281.

e. NRC agreed on December 4, 2001, not to issue a shut-down order to Davis-Besse, based in part on Davis-Besse's submissions regarding its previous inspections and on its agreement to shut down for refueling in February 2002. C.A. App. 875. When Davis-Besse did later shut down for refueling, the plant discovered five cracked nozzles. *Id.* at 840-841. During efforts to repair the cracks, one of the nozzles unexpectedly tilted over, revealing a large corrosion cavity, approximately seven inches long, five inches wide, and six and a half inches deep. *Id.* at 814, 840-841; Tr. 740. Within this area, the carbon steel had completely degraded—constituting a "loss of the design basis structural/pressure retaining boundary"—leaving only the thin layer of cladding, which had "deflected upward" into the cavity. C.A. App. 841.

4. In January 2006, a grand jury indicted petitioner and two other Davis-Besse employees on five counts of knowingly and willfully concealing material information and making false statements to the NRC, in violation of 18 U.S.C. 1001 and 2. Pet. App. 2a, 22a. At trial, peti-

tioner acknowledged conveying false information to NRC, Tr. 1986, 1995-1996, 2000, but denied doing so knowingly and with an intent to deceive. Tr. 1817-1818, 1843. Among other things, petitioner acknowledged erroneously assuring NRC staff at the October 11, 2001, meeting that the 1998 and 2000 inspections combined covered all nozzles. Tr. 1917-1918, 1989-1990. Petitioner testified that this assurance was based on Siemaszko's review of the video inspections and that he knew Siemaszko's work was not complete when the assurance was made. *Ibid.* Petitioner also testified that Siemaszko's review was the source of petitioner's subsequent false assurances that the 1996 inspection included the entire head. Tr. 1992. Yet petitioner denied that he ever "actually spoke face-to-face [with Siemaszko] regarding that." *Ibid.* Petitioner testified that he "stopped by" Siemaszko's cubicle only once when Siemaszko was reviewing still images, to learn how Siemaszko was attributing boric acid deposits to flange leaks rather than to cracked nozzles (an issue distinct from the completeness of the video inspections), and claimed that he did not view the videos until he showed them to NRC. *Id.* at 1912-1915. This contradicted petitioner's statement to the company investigator that he had reviewed the videos "while preparing for the NRC interactions." C.A. App. 831.

At the request of the government, the district court gave the jury a "deliberate ignorance" instruction based on Sixth Circuit Pattern Jury Instruction 2.09. Pet. App. 26a. The court advised the jury that:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that [petitioner] deliberately ignored a high probability that the submissions and presentations to the

> NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. * * * But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

Tr. 2338-2339. The jury convicted petitioner on three counts of violating 18 U.S.C. 1001 and 2. Pet. App. 26a, 142a-143a. Petitioner filed a motion for a judgment of acquittal and for a new trial, arguing that the evidence was insufficient to warrant the deliberate-ignorance instruction. See *id.* at 62a-63a. The district court denied the motion, reasoning that the decision to give the instruction, if error, was harmless given the sufficiency of the evidence proving petitioner's actual knowledge. *Id.* at 63a-64a.

5. The court of appeals affirmed. Pet. App. 1a-60a. The court concluded that the district court "properly instructed the jury" that it could find that petitioner had the requisite knowledge under a deliberate-ignorance theory because the instruction was a correct statement of the law and because the court gave a limiting instruction that "foreclose[d] the possibility" that the conviction was "improperly based on negligence or carelessness." *Id.* at 28a-29a (brackets in original) (citation omitted). The court also concluded that the government had presented ample evidence to support a conviction based on

either actual knowledge or on a conclusion that petitioner acted with deliberate ignorance. *Id.* at 30a-33a. In addition, the court determined that, even if it had been error for the district court to give a deliberate-ignorance instruction, any error was harmless because the court's instructions correctly stated the law and because the evidence was sufficient to prove "actual" knowledge. *Id.* at 29a-30a (citing *Griffin* v. *United States*, 502 U.S. 46, 55-56 (1991) and *United States* v. *Mari*, 47 F.3d 782, 785-787 (6th Cir. 1995)).

ARGUMENT

1. Petitioner contends (Pet. 16-19) that the government presented insufficient evidence to justify the district court's giving a deliberate-ignorance instruction to the jury. He asks (Pet. 17) this Court to "[r]estrict[] the deliberate ignorance instruction to cases in which there is evidence that the defendant took affirmative steps to avoid gaining knowledge based on a motive to escape conviction." That argument does not warrant further review because it is incorrect and because it does not implicate any disagreement among the courts of appeals.

a. Petitioner does not appear to argue that jury instructions on deliberate ignorance must require the jury to find that the defendant avoided learning the truth because of a motive to avoid criminal liability.[1] The

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[1] Petitioner has waived such an argument in any case by failing to raise it in the district court or court of appeals. See Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 465 (9th ed. 2007) (noting that this Court "generally declines to review issues not pressed or passed upon by the lower courts") (emphasis omitted); see also *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Petitioner did argue in the court of appeals that the court's pattern jury instruction on deliberate ignorance should not be given unless the evidence supports an inference that a defendant remained deliberately ignorant because he was moti-

courts of appeals generally agree that a deliberate-ignorance instruction need not include a requirement that the defendant's motive was to create a defense to criminal conviction. See, *e.g.*, *United States* v. *Singh*, 222 F.3d 6, 11 (1st Cir. 2000) (upholding deliberate-ignorance instruction similar to model instruction given in this case); *United States* v. *Nektalov*, 461 F.3d 309, 313-314 (2d Cir. 2006) (same); *United States* v. *Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000); *United States* v. *Campbell*, 977 F.2d 854 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); *United States* v. *Newell*, 315 F.3d 510, 528 (5th Cir. 2002); *United States* v. *Beaty*, 245 F.3d 617, 622 (6th Cir.), cert. denied, 534 U.S. 895 (2001); *United States* v. *Hauert*, 40 F.3d 197, 203 (7th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); *United States* v. *Heredia*, 483 F.3d 913, 919-920 (9th Cir.) (en banc), cert. denied, 552 U.S. 1077 (2007).

Petitioner asserts instead that three courts of appeals "have squarely held that" evidence of a defendant's "motive to escape prosecution" is an "indispensable foundation for the giving" of a deliberate-ignorance instruction. Pet. 16 (citing *United States* v. *Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States* v. *Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States* v. *Delreal-Ordones*, 213 F.3d 1263, 1268-1269 (10th Cir. 2000)). That is incorrect. It is true that the three decisions petitioner cites observe that a deliberate-ignorance instruction is proper "when the Government presents evidence that the defendant purposely contrived to avoid learning all of the facts in order to have

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vated by a desire to escape criminal conviction. Pet. C.A. Br 48. But petitioner neither asked the district court to instruct the jury on motive nor argued in the court of appeals that the district court's failure to do so was error

a defense in the event of prosecution." *Delreal-Ordones*, 213 F.3d at 1268 (internal citation omitted); accord *Puche*, 350 F.3d at 1149; *Willis*, 277 F.3d at 1032. But all of those cases upheld the district court's decision to instruct the jury on deliberate ignorance without inquiring whether the government had presented any direct evidence of the defendant's motive in remaining ignorant. Instead, the courts found sufficient evidence to justify the instruction in each case because the government had established that the defendant "purposely" or "deliberately" avoided acquiring information that would have supplied knowledge of the fact at issue. See *Puche*, 350 F.3d at 1149; *Willis*, 277 F.3d at 1032; *Delreal-Ordones*, 213 F.3d at 1268-1269.

b. The same is true in petitioner's case. Petitioner argues (Pet. 18-19) that there was insufficient evidence to support the deliberate-ignorance instruction because petitioner might have had "innocent reasons" for remaining ignorant about the falsity of the information he conveyed to NRC. But so long as the record contained sufficient evidence from which a rational jury could infer that the defendant was aware of a high probability that the submissions to the government were false and that he deliberately closed his eyes to that fact, the possibility that he might have had "innocent reasons" for his actions does not preclude the giving of a deliberate-ignorance instruction. Deliberate ignorance satisfies the knowledge element of the offense regardless of the defendant's asserted reason for remaining deliberately in the dark about lies to the government. The statute does not require that a defendant's intent to deceive have been motivated by an intent to avoid conviction. A defendant's intentional decision to remain ignorant of relevant facts because he wishes to effect a particular regulatory

outcome is no less "knowing and willful," and therefore no less a violation of Section 1001.

Not every failure to investigate a suspicion about a representation that turns out to be false will constitute a "knowing and willful" deception. But that issue is for the jury to resolve. Here, the district court properly instructed the jury that, in order to prove that petitioner acted "knowingly and willfully," 18 U.S.C. 1001, when he made false statements to and concealed material facts from NRC, the government needed to prove beyond a reasonable doubt that petitioner acted "with the intent to deceive." Tr. 2334. The court further instructed the jury that "good faith" constituted a complete defense, and that petitioner could not be convicted on "an opinion honestly held." Tr. 2337. That instruction, taken together with the court's instructions on knowledge and deliberate ignorance, was sufficient to ensure that the jury did not convict petitioner based on a finding that petitioner "innocent[ly]" remained ignorant of the operative facts.

Establishing proof of deliberate ignorance through proof of "an awareness of a high probability" establishes more than proof of "merely a reckless disregard, or a suspicion followed by a failure to make further inquiry." *United States* v. *Jewell*, 532 F.2d 697, 707 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting). Rather, it "establishes knowledge as a matter of subjective belief." *Ibid.* Moreover, the instruction here specifically advised that the jury could not find knowledge based on mere "[c]arelessness, or negligence, or foolishness." Tr. 2339. The evidence before the jury was more than sufficient to establish that petitioner had the mental state necessary to violate Section 1001.

c. In any event, contrary to petitioner's claim (Pet. 18-19), the government introduced sufficient evidence to prove that petitioner did act with "deliberate ignorance" out of a "desire to escape conviction." Accordingly, he would not prevail even under his own test. Petitioner is incorrect in asserting (*ibid.*) that he was convicted for "failing to fully assimilate historical information about prior plant cleanings." He was convicted for making false assurances to NRC about the completeness of vessel-head inspections without a credible basis for such statements—and at the very least with the subjective awareness of the high probability that the assurances were not true (if not positive knowledge that the assurances were false). As detailed at pp. 6-12, *supra*, petitioner repeatedly assured NRC that Davis-Besse could and did inspect all nozzle penetrations on the vessel head. Petitioner testified that he relied on the report Siemaszko prepared based on a review of previous inspection videos. Petitioner testified that he assured NRC that 100 percent of the plant's nozzles had been visually inspected without discussing the matter with Siemaszko, reviewing the video himself, reviewing the inspection report, or questioning the employee who performed the inspection. Tr. 1908-1909, 1917-1918, 1923-1924, 1991-1992.

Moreover, petitioner reported to NRC that 100 percent of the nozzles had been inspected in spite of his strong reason to suspect that no previous video inspection could have been complete. The trial evidence demonstrated that Davis-Besse's access to the vessel head was severely restricted. Tr. 837. The plant's "project review group" had previously recommended a design modification to install inspection openings in the service structure in order to remedy the fact that the plant of-

fered "less that 50% accessibility to the reactor vessel head." C.A. App. 823. Petitioner was aware of the recommended modification and had direct responsibility for design issues. Tr. 1823-1824, 1953. Petitioner was also aware that the previous inspections had been impeded by boric acid deposits presumed to be from leaking flanges. C.A. App. 233, 237. And petitioner knew that all previous inspections had been conducted before the Oconee findings and thus before the industry (and Davis-Besse operators) was on notice of the need for close inspection of all nozzle penetrations. Tr. 1837-1838; C.A. App. 246-254. Finally, petitioner made false assurances that Davis-Besse was able to inspect the entire vessel head before he had even assigned Siemaszko the task of reporting nozzle-specific results, Tr. 246-247, 393-395, 1227-1229, and before Siemaszko had completed the table, Tr. 1916-1918; C.A. App. 667, 678.

Thus, the jury had ample evidence from which to infer not only that petitioner was aware of the high probability that his representations were false, but also that he avoided asking questions that would have revealed such falsity in order to retain the ability to deny culpability in the event NRC discovered the truth.

2. Petitioner also urges (Pet. 19-22) that the court of appeals applied an incorrect standard for determining whether a deliberate-ignorance instruction that lacks an adequate evidentiary basis constitutes harmless error; he argues that review is warranted to resolve a conflict in the circuits on this issue. This Court previously has denied review of cases involving the identical circuit conflict alleged here. See *Hernandez-Mendoza* v. *United States*, No. 10-6879, 2011 WL 677072 (U.S. Feb. 28, 2011); *Kennard* v. *United States*, 551 U.S. 1148 (2007) (No. 06-10149); *Ebert* v. *United States*, 534 U.S. 832

(2001) (No. 00-9596); *Ebert* v. *United States*, 529 U.S. 1005 (2000) (No. 99-6789). There is no reason for a different result in this case. In any event, the court of appeals' decision is correct, and the purported conflict (if it still exists) does not presently require this Court's attention. Moreover, this case is an unsuitable vehicle for addressing the question petitioner presents.

a. As discussed *supra*, the court of appeals found that there was sufficient evidence to support the district court's giving a deliberate-ignorance instruction in this case. Pet. App. 31a-33a. The court of appeals also held in the alternative that, even if there had not been sufficient evidence to support the instruction, any error in giving the instruction would have been harmless because there was sufficient evidence to support petitioner's convictions on an actual-knowledge theory. *Id.* at 30a. That alternative conclusion was correct.

The instruction on deliberate ignorance in part informed the jury that it could convict petitioner based on a deliberate-ignorance theory if it was "convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts * * * or included false statements and that the defendant deliberately closed his eyes to what was obvious." Tr. 2338-2339. "[T]he 'crucial assumption' underlying the system of trial by jury 'is that juries will follow the instructions given them by the trial judge.'" *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (quoting *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979)); see *Zafiro* v. *United States*, 506 U.S. 534, 540-541 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). A jury following the district court's instruction (as a reviewing court must assume it did) and finding no evidence of deliberate ig-

norance could not have convicted petitioner by finding he was deliberately ignorant. See, *e.g.*, *United States* v. *Stone*, 9 F.3d 934, 938 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994). Accordingly, if the deliberate-ignorance instruction was not warranted on the facts, then giving the instruction was harmless because a properly instructed jury would have rejected it and instead relied on an alternative theory supported by the evidence.

That is precisely the logic of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), on which the court of appeals correctly relied. Pet. App. 30a & n.3. In *Griffin*, the Court rejected the defendant's claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." 502 U.S. at 56. As the Court explained, it is " settled law * * * that a general jury verdict [i]s valid so long as it [i]s legally supportable on one of the submitted grounds—even though that g[i]ve[s] no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. The Court distinguished between a jury instruction that misstates the law and one that merely presents one theory of conviction (out of several) that is not supported by the evidence. The Court explained:

> When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59 (emphasis omitted); see *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("We reasoned [in *Griffin*] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Here, petitioner does not claim that any of the jury instructions—on actual knowledge or deliberate ignorance—was legally faulty. Rather, petitioner claims that the deliberate-ignorance theory was unsupported by the evidence offered at trial. But under *Griffin*, the submission to the jury of the deliberate-ignorance theory—even if the evidence at trial had been insufficient to support that theory—would not warrant reversal. See *Stone*, 9 F.3d at 937-942; see also *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994).

Petitioner's reliance (*e.g.*, Pet. 18, 21-22) on cases like *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), and *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), is misplaced. Those cases, unlike this case, involved jury instructions that were legally erroneous because they omitted or misdescribed an element of the offense. See *Skilling*, 130 S. Ct. at 2934; *Hedgpeth*, 129 S. Ct. at 530-531. When a jury returns a general guilty verdict after being instructed on one legally sound theory of guilt and one legally unsound theory, a reviewing court ordinarily cannot have confidence that the verdict rests on the legally sound theory, and thus the verdict may stand only if the reviewing court determines that any error was harmless on the particular facts of the case. By contrast, this case does not involve a legally erroneous jury instruction. As the court of appeals correctly recognized, *Griffin* supplies the appropriate framework for review. Pet. App. 30a (citing Sixth Circuit's decision in *United States* v. *Mari*, 47 F.3d 782, cert. denied, 515

U.S. 1166 (1995), which applies *Griffin*). Under *Griffin*, any error in issuing a deliberate-ignorance instruction that lacks adequate evidentiary support is rendered harmless beyond a reasonable doubt if sufficient evidence supports a valid alternative theory of guilt. See 502 U.S. at 56-60; see also *Stone*, 9 F.3d at 937-942. Accordingly, given that petitioner's convictions "can be upheld under an actual knowledge theory," the court of appeals properly determined that petitioner did not suffer any prejudice as a result of the district court's issuance of both actual-knowledge and deliberate-ignorance instructions. Pet. App. 30a.

b. At least five circuits have held that instructing the jury on deliberate ignorance when there is insufficient factual support for the charge is harmless if the instruction is legally correct (*e.g.*, the instruction permits the jury to rely on deliberate ignorance only if the evidence shows such ignorance beyond a reasonable doubt, and it explains that deliberate ignorance requires more than negligence). See *United States* v. *Ayon Corrales*, 608 F.3d 654, 657-658 (10th Cir. 2010); *United States* v. *Leahy*, 445 F.3d 634, 654 n.15 (3d Cir.), cert. denied, 549 U.S. 1071 (2006); *Mari*, 47 F.3d at 786; *Adeniji*, 31 F.3d at 63- 64; *Stone*, 9 F.3d at 938.[2] Those

[2] The Tenth Circuit in *United States* v. *Francisco-Lopez*, 939 F.2d 1405, 1412-1413 (1991), concluded that the use of the particular instruction in that case was not harmless error because the evidence of actual knowledge was not so compelling that the jury would necessarily have convicted the defendant on that theory. See *United States* v. *Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994) (applying *Francisco-Lopez*). More recently, though, the Tenth Circuit has reliably applied *Griffin* principles to find harmless error where the jury was instructed on a factually unsupported deliberate-ignorance theory, but the evidence was sufficient on an actual-knowledge theory. See *Ayon Corrales*, 608 F.3d at 657-658; *United States* v. *McConnel*, 464 F.3d 1152, 1159-1160 (2006),

courts reason, like the Sixth Circuit here and in accord with *Griffin*, that if the evidence is insufficient to support a theory of deliberate ignorance but is sufficient to support a finding of actual knowledge, then the jury "must not have convicted the defendant on the basis of deliberate ignorance" but rather "on the basis of [the defendant's] positive knowledge." *Mari*, 47 F.3d at 785 (emphasis omitted).

As petitioner notes (Pet. 20), some courts of appeals have addressed the application of harmless-error review to a deliberate-ignorance instruction slightly differently. The Eighth Circuit in *United States* v. *Barnhart*, 979 F.2d 647 (1992), concluded that instructing a jury on deliberate ignorance does not constitute harmless error if the evidence of actual knowledge, although sufficient to support the jury's finding, is not overwhelming. See *id.* at 652-653 & n.1; *United States* v. *Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998) (following *Barnhart*, but finding the error in giving deliberate-ignorance instruction to be harmless where evidence of actual knowledge was overwhelming). The Ninth Circuit also reached that conclusion. See *United States* v. *Mapelli*, 971 F.2d 284, 287 (1992); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1075-1076 (1991), disapproved on other grounds by *United States* v. *Heredia*, 483 F.3d 913 (2007) (en banc).[3] Those cases express a concern that,

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cert. denied, 549 U.S. 1361 (2007); *United States* v. *Hanzlicek*, 187 F.3d 1228, 1234-1236 (1999).

[3] Petitioner contends (Pet. 20) that the Fifth Circuit also "implicit-[ly]" takes that approach, pointing to *United States* v. *Ojebode*, 957 F.2d 1218 (1992), cert. denied, 507 U.S. 923 (1993). *Ojebode*, however, makes no mention of the harmless-error doctrine and does not reveal what harmless-error standard the Fifth Circuit employs in cases of this sort. The Fifth Circuit has since applied *Griffin* principles to conclude that

absent evidence to support a deliberate-ignorance instruction, juries may incorrectly employ a negligence or recklessness standard. See, *e.g.*, *Barnhart*, 979 F.2d at 652; *Mapelli*, 971 F.2d at 287.

For the reasons given above, the government disagrees with the standard used in cases like *Barnhart* and *Mapelli*. But review is unwarranted because the outlier circuits that have in the past failed to apply *Griffin*—the Eighth and Ninth Circuits—are reevaluating their cases, to the point that any division of authority that existed in the past may nearly be repaired. In *United States* v. *Hernandez-Mendoza*, 611 F.3d 418, 418-419 (2010), the Eighth Circuit retreated from its analysis in *Barnhart* and effectively overruled *Barnhart* because *Barnhart* failed to consider and apply *Griffin*. Similarly, the Ninth Circuit decisions purportedly in conflict with this case do not mention *Griffin*, and do not reject its application. And the Ninth Circuit in a more recent unpublished case has applied *Griffin* in evaluating the harmlessness of a deliberate-ignorance instruction unsupported by the evidence. *United States* v. *Daly*, 243 Fed. Appx. 302, 309, cert. denied, 552 U.S. 1070 (2007), and 552 U.S. 1211 (2008). In addition, the en banc Ninth Circuit has rejected the view that giving a deliberate-ignorance instruction "risks lessening the state of mind that a jury must find to something akin to recklessness or negligence," and has concluded that where (as here) the jury is instructed that it may not convict based on a finding that the defendant was merely careless, "[r]ecklessness or negligence never comes into play, and there is little reason to suspect that juries

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the issuance of a factually unsupported deliberate-ignorance instruction was harmless. See *United States* v. *Black*, No. 96-20423, 1997 WL 367451, at *4 (June 9, 1997) (unpublished but noted at 119 F 3d 1).

will import these concepts, as to which they are not instructed, into their deliberations." *Heredia*, 483 F.3d at 924. That en banc pronouncement so far undermines the reasoning of *Mapelli* and *Sanchez-Robles* that any nominal division of authority is illusory. At a minimum, it is reasonable to expect that in time the Ninth Circuit will, like the Eighth Circuit in *Hernandez-Mendoza*, recognize in a published opinion the application of *Griffin* to cases like this. At that point, there would clearly be no split for this Court to resolve.

c. Regardless, this case does not present a suitable vehicle for determining the proper approach to the harmless-error issue, for two reasons.

First, petitioner's claim is based on the premise that there was an insufficient factual basis for the deliberate-ignorance instruction. As discussed, the court of appeals properly found otherwise. Because this Court could affirm the judgment by affirming the court of appeals' fact-bound holding that there was no error at all, this is not an appropriate vehicle for reaching the harmless-error issue petitioner would present. Cf. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (declining to reach harmlessness issue on which review was granted after finding no error).

Second, any error would be harmless even on the standard most favorable to petitioner. That most favorable standard asks whether the evidence at trial of actual knowledge was overwhelming. See, *e.g.*, *Covington*, 133 F.3d at 645 (finding the error in giving deliberate ignorance instruction to be harmless where evidence of guilt was overwhelming). That is the case here. As the court of appeals concluded, the circumstantial evidence clearly supported a finding by the jury of actual knowl-

edge. Pet. App. 35a-48a (detailing evidence demonstrating actual knowledge as to each count of conviction).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-720

IN THE
Supreme Court of the United States

DAVID C. GEISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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STATUTES

18 U.S.C. § 1001 2

REPLY BRIEF FOR PETITIONER

In his petition for certiorari, Mr. Geisen demonstrated why this Court should grant review to provide guidance on the doctrine of deliberate ignorance. In particular, Mr. Geisen showed how his case presents two discrete questions on which the lower courts are divided: (1) whether application of the doctrine should be limited to cases where any "ignorance" was motivated by the attempt to escape prosecution; and (2) whether the *per se* harmless error rule applied by the Court below is the proper standard when a court erroneously instructs a jury on deliberate ignorance.

Mr. Geisen's petition also established why this case presents an excellent vehicle for resolving these important questions. Indeed, as Mr. Geisen showed, the manner in which these issues are resolved *already has* made a difference on these facts: In the parallel administrative proceedings, in which the Nuclear Regulatory Commission refused to apply a deliberate ignorance rule, the same proof of willfulness and scienter was found insufficient under a civil preponderance-of-the-evidence standard. App. 65a-138a, and Petition for Writ of Certiorari (Pet.) 6-7. A jury determined otherwise only the district court here permitted the government to go forward on a deliberate ignorance theory.

The United States' brief in opposition acknowledges the legal disarray, and it at least tacitly acknowledges the importance of the questions raised by Mr. Geisen. Nonetheless, the United States urges the Court to deny review for a variety of reasons -- the supposedly complex nature of the facts, the supposition

that the lower courts can resolve the confusion on their own, and the assertion that Mr. Geisen cannot prevail on the merits even if the Court agrees with him on the law. Upon examination, each of the government's arguments is meritless.

1. At the outset, the United States tries to portray Mr. Geisen's case as complicated and fact-bound, and suggests that a thorough review of these intricate facts supposedly shows Mr. Geisen's level of actual knowledge of the falsity of his presentations and statements to the NRC to be "overwhelming." Brief for the United States in Opposition ("BIO") 27. But the important facts are simple and inconsistent with the government's rendition.

In the district court, David Geisen was charged with willfully and knowingly making false statements in violation of 18 U.S.C. § 1001, based on presentations and paperwork he presented to the NRC as part of his supervisorial responsibilities. Pet. 3. There was no doubt at trial that Mr. Geisen had done a poor job in confirming the accuracy of his statements to the NRC -- he admitted as much on the stand -- but there was simply no evidence as to why he would have lied intentionally to the NRC about inspections he didn't conduct. *See* Pet. 4. In other words, the critical issue at trial was actual knowledge. Deliberate ignorance was added by the government as a theory only at the last minute, when it became clear that its evidence of actual knowledge was minimal. It was a theory that made no sense on its own as the government never suggested any plausible reason Mr. Geisen would deliberately fail to prepare for NRC presentations, other than speculation about wanting to aid his employer's bottom line -- a motive so general and broad as to be

present in virtually every case. *See United States v. Goyal*, 629 F.3d 912, 919 (9th Cir. 2010) (rejecting notion that general financial incentives in line with those of company bottom line can suffice to establish motive to falsify). However, despite the implausibility of the deliberate ignorance theory on its face, its injection into the case created a great potential for confusion, as the trial evidence of Mr. Geisen's negligence as a manager was substantial, Pet. 4-5, and the widely-recognized danger of this instruction is to prompt jurors to convict under a negligence standard. Pet. 14-15.

Even so, jurors returned a divided verdict, acquitting on two counts and convicting on three others after considerable deliberations. Pet. 5. In reviewing post-verdict motions, and hearing all the evidence, the trial judge said this was a "close case" as to whether there was legally sufficient evidence of Mr. Geisen's knowledge and willfulness. App. 63a. And the NRC, the putative victim of the false statements, has gone further, hearing all of the evidence and determining that Mr. Geisen had no actual knowledge that his statements to it were false under a civil preponderance-of-the-evidence standard. App. 65a-138a; Pet. 6-7. Likewise, the Sixth Circuit, in rejecting Mr. Geisen's sufficiency of the evidence challenge, never suggested that there was "overwhelming" evidence of actual knowledge; it merely ruled that the evidence made it over the sufficiency bar. App. 1a-60a.

Nonetheless, the government's entreaty to deny certiorari rests largely on its claim that the evidence of actual knowledge was "overwhelming," BIO at 27, purportedly rendering Mr. Geisen's arguments about deliberate ignorance beside the point. The fact that

the government's central premise is contradicted by the trial judge, the appellate court and the NRC itself says all the Court needs to know about the weakness of the government's position.

2. As to the law, the government's arguments also fail. Indeed, even the United States cannot dispute that the deliberate ignorance doctrine is one of widespread application, which this Court has never addressed, and which commentators and courts have shown is in general disarray. Nor can the government meaningfully dispute the importance of this issue, given the breadth of the false statements law, the fact that thousands of mid-level managers like Mr. Geisen interact with government officials every day, and the Sixth Circuit's application of this doctrine to anyone who "deliberately cho[oses] not to prepare himself in preparing . . . submissions" to a government agency. Pet. 16. Instead, the government tries to poke holes in the extent of legal division presented by Mr. Geisen's petition. But in the end, both the motive issue and the harmless error issue raised in Mr. Geisen's petition reflect a general level of legal disagreement in an important area of the law -- an area this Court has not explored previously and is worthy of this Court's corrective intervention.

a. On the motive issue, the Government asserts that the Courts of Appeals "generally agree" about the absence of any need to prove a motive to escape prosecution as a predicate to giving a deliberate ignorance instruction. BIO 16. But the United States must nonetheless concede that at least three courts of appeal have examined the "propriety" of a deliberate ignorance instruction by determining whether the government has presented evidence that

"'the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of prosecution.'" BIO at 16-17 *quoting United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 (10th Cir. 2000). The government goes on to argue that the three Courts of Appeals that have stated this rule have not seriously applied it, and thus any Circuit split supposedly vanishes. BIO 16-17. But this facially implausible argument cannot withstand scrutiny, as Judge Kleinfeld's concurring opinion in *United States v. Heredia*, 483 F.3d 913, 924-30 (9th Cir. 2007) (Kleinfeld, J. concurring) demonstrates.

Judge Kleinfeld's opinion in *Heredia* not only eloquently explains the necessity of a motive requirement in order to remain faithful to the statutory language -- "to allow conviction without positive knowledge or wilful avoidance of such knowledge is to erase the scienter requirement from the statute" -- but also highlights the extraordinary amount of contradiction and confusion among courts on this issue. *Id.* The fact of the matter is, the government's nitpicking aside, there remains a substantial level of disagreement among the lower courts about the very important issue of whether a motive to escape prosecution is a necessary predicate for the giving of a deliberate ignorance instruction.

Nor can be there be any real question about why this particular issue is so important. Read broadly, the deliberate ignorance doctrine presents real dangers about convictions based on negligence, particularly under circumstances like those presented in this case. *See, e.g.*, *United States v. Alston-Graves*, 435 F.3d 331, 340 (D.C. Cir. 2006) (noting danger that willful blindness instruction improperly permits conviction for

unexplored 'red flags').[1] As Judge Kleinfeld explained in his concurring opinion in *Heredia*, the motive requirement acts as a concrete check on this danger, limiting the scope of the deliberate ignorance doctrine to narrow, identifiable bounds in which the blindness is motivated by a desire to create a defense to prosecution. *Heredia*, 483 F.3d at 924-30. Without such a requirement, the government can rely on broad and generalized financial incentives as a supposed motivator to avoid knowledge, as it did here, even though any link between such a generalized motive and scienter is present in every case and is completely speculative. *United States v. Goyal*, 629 F.3d at 919.

Currently, the law is quite unsettled as to whether this important check on the doctrine of deliberate ignorance is required. Nothing in the government's brief shows otherwise. This Court should intervene.

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[1] "One problem with the various formulations of this instruction is that the jury might convict a defendant for acting recklessly - a problem the drafters of the Model Penal Code recognized - or even for acting negligently. Negligence and recklessness are not the same as intentional and knowing conduct. . . . Yet willful blindness instructions have been justified when '"record evidence reveals 'flags' of suspicion that, uninvestigated, suggest willful blindness."' *United States v. Epstein*, 426 F.3d 431, 440 (1st Cir. 2005) (quoting *United States v. Coviello*, 225 F.3d 54, 70 (1st Cir. 2000)); *see also United States v. Craig*, 178 F.3d 891, 898 (7th Cir. 1999) (affirming conviction based on willful blindness because defendant "saw and experienced enough suspicious activities to raise several red flags," which "supports an inference that she consciously chose not to pursue the truth")." *Alston-Graves*, 435 F.3d at 340.

b. On the harmless error issue, the Government admits there is a circuit split as to whether traditional harmless error review or *Mari's per se* harmless error rule applies under these circumstances. Indeed, the government's own discussion of this issue reveals numerous intra-circuit conflicts in which panels of the same Court of Appeals contradict one another in published and unpublished opinions. *See, e.g.*, BIO 24-25 (arguing that unpublished opinions of 8th and 10th circuits, applying a different standard than earlier published opinions, show absence of conflict). Nonetheless, the government asserts that more Court of Appeals are moving in its direction based on their supposedly better understanding of this Court's 20-year old decision in *Griffin v. United States*, 502 U.S. 46 (1991). According to the government, the lower courts will ultimately reach unanimity in its favor on this point. BIO 20-27. But the fact they have not, 20 years later, is evidence of the intractability and ripeness of the split, not evidence that it will go away on its own. It is this Court's decisions -- and specifically the ambiguity of line between the harmless error rules in *Griffin* and *Yates v. United States*, 354 U.S. 298 (1957) -- that are causing this disarray, *see* Pet. 20-22, and only this Court can definitively resolve it.

c. On the question of whether Mr. Geisen's case is suitable for certiorari, the government's main argument is that the evidence of actual knowledge is supposedly so overwhelming as to make any questions of deliberate ignorance beside the point. BIO 27. But, as noted, this argument is refuted by the district court's description of the sufficiency of actual knowledge evidence as "close", App. 63a, the jury's

divided verdict on similar counts, and the NRC's civil acquittal of Mr. Geisen under a preponderance of the evidence standard in which deliberate ignorance was rejected as a viable theory. App. 65a-138a.

As a fall back, the Government also disputes the suitability of this case for review because the Court of Appeals "properly" found that the evidence of deliberate ignorance sufficed to warrant a jury instruction. BIO 27. But that contention is correct only if the Court determines that the Sixth Circuit's legal standard, in which motive to escape prosecution was not considered, was the appropriate one. If it does not, this Court will be squarely faced with the Sixth Circuit's alternative reliance on the harmless *per se* rule of *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995). And there can be no doubt about the importance of the proper harmless error standard in this case. The trial below involved at most weak evidence of actual knowledge, but substantial evidence of managerial negligence. These are precisely the circumstances courts have identified where the deliberate ignorance instruction is the most harmful -- a weak case of actual knowledge, but a strong case of negligence. *Alston-Graves*, 435 F.3d at 340.

This is a case, in other words, in which this Court's determination of the proper standard will be dispositive, and the government's harmlessness analysis contends otherwise only by ignoring the most harmful part of the error. Indeed, it is difficult to conceive of a better vehicle for this Court's intervention than a case where a criminal jury convicted after receiving a deliberate ignorance instruction, but a civil administrative panel, reviewing the same facts, acquitted Mr. Geisen of willfully making false statements to

it after rejecting application of the deliberate ignorance doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

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